Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1998

FEATHER O. HOUSTOUN, ET AL.,
Petitioners

v.

EDWIN MALDONADO, ET AL.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a State violate the Equal Protection Clause by providing that, for one year after their arrival in the State, new residents who apply for welfare benefits may receive only the amount they would have received in their State of prior residence?

2. Should the Court reconsider *Shapiro v. Thompson*, 394 U.S. 618 (1969)?

LIST OF PARTIES

The petitioners are Feather O. Houstoun, the Secretary of the Pennsylvania Department of Public Welfare; and her subordinate, Don Jose Stovall, the Executive Director of the Philadelphia Board of Assistance.

The respondents are Edwin Maldonado and his wife Maria Delores Maldonado, individually, as next friends for their children Ana, Pablo, Rey, Yesenia and Jose Maldonado, and on behalf of a class of similarly situated persons; Maria Ortiz and her husband Michael Ortiz, individually, as next friends for their children Julie, Michael and Angelica Ortiz, and on behalf of a class of similarly situated persons; Kensington Welfare Rights Union; Philadelphia Welfare Rights Organization, on behalf of itself and its members; and Traveler's Aid Society of Philadelphia, on behalf of itself and its clients.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 157 F.3d 179 and is reprinted in the appendix to this petition ("Pet. App.") at 1a. The District Court's opinion is reported at 177 F.R.D. 311 and is reprinted at Pet. App. 25a .

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on September 9, 1998, and this petition has been filed within ninety days of that date. The Court has jurisdiction to review the case pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution provides in relevant part that "[n]o State shall ... deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amend XIV, § 1.

2. The Pennsylvania Public Welfare Code provides in relevant part as follows:

> Cash assistance for applicants and recipients of aid to families with dependent children who have resided in this Commonwealth for less than twelve months shall not exceed the lesser of the maximum assistance payment that would have been received from the applicant's or recipient's state of prior residence or the maximum assistance payment available to the applicant or

recipient in this Commonwealth.

Pa. Stat. Ann., tit. 62, § 432(5)(ii) (Purdon 1996).

STATEMENT OF THE CASE

Pennsylvania law provides that, for applicants who have resided in the Commonwealth for less than twelve months, cash assistance under the Aid to Families with Dependent Children program[1] is limited to 1) the amount which they would have received in their prior residence, or 2) the maximum amount available in Pennsylvania, whichever is less. Pa. Stat. Ann., tit. 62, § 432(5)(ii) (Purdon 1996). The respondents claim that this twelve-month residency provision violates their constitutional right to travel. They brought this action pursuant to 42 U.S.C. § 1983, seeking declaratory and injunctive relief.

1. In 1996, Congress enacted a fundamental change in the Nation's welfare laws. Until that time, the federal government's primary vehicle for providing cash assistance to needy families was the Aid to Families with Dependent Children or "AFDC" program, formerly codified at 42 U.S.C. §§ 601 *et seq*. AFDC, established in 1935 as part of the Social Security Act, *King v. Smith*, 392 U.S. 309, 313 (1968), was an exercise in "cooperative federalism," largely administered by the States but financed by a combination of state and federal funds. *Id.* at 316. AFDC was conceived as an entitlement program, in which recipients' eligibility for benefits, and the state and federal governments' financial commitment to pay for them, were essentially open-

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[1]As we explain below, the Aid to Families with Dependent Children or AFDC program has been abolished and replaced by Temporary Assistance to Needy Families ("TANF"). *See infra* at 3. Pennsylvania's statute still uses the older terminology.

ended. Pet. App. 31a, n.4.

In the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-93, 110 Stat. 2105 (1996), Congress abolished AFDC, establishing in its stead a new program, known as Temporary Aid to Needy Families or "TANF," likewise codified at 42 U.S.C. §§ 601 *et seq.*, as amended. Of the many changes encompassed by this legislation, we mention here only a few that are relevant to this case.

First, TANF is not an open-ended entitlement program. The statute provides that it "shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part," 42 U.S.C. § 601(b), and there is a lifetime limit of 60 months eligibility for benefits. 42 U.S.C. § 608(a)(7). Nor is the federal financial commitment an open-ended one, in which a State automatically gets money for each aid recipient. Rather, each State gets a finite amount — essentially capped at 1994 levels at least through the year 2002, 42 U.S.C. § 603(a)(1)(B); Pet. App. 31a, n.4 — which it must then manage as it thinks best.[2]

Second, the federal funds allotted under TANF are block grants which each State has great discretion to manage; TANF money may be used not just for cash assistance to eligible families, but for a variety of other programs such as education, job training, child care, and home heating and cooling costs. 42 U.S.C. § 604(a) (States may use grants "in any manner that is reasonably calculated to accomplish the purpose of this [act]").

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[2]Each State must continue its funding at least at 80% of 1994 levels. 42 U.S.C. § 609(a)(7).

Third, and most relevant to this case, the federal statute expressly provides that States

> may apply to a family the rules (including benefit amounts) of the program funded under this part of another State if the family has moved to the State from the other State and has resided in the State for less than 12 months.

42 U.S.C. § 604(c); *see* 42 U.S.C. § 602(a)(1)(B)(i) (State plan to indicate whether State intends to treat families moving into the State differently from other families, and if so, how).

When Pennsylvania enacted its own welfare reform statute, known as Act 1996-35, it included the following provision:

> Cash assistance for applicants ... who have resided in this Commonwealth for less than twelve months shall not exceed the lesser of the maximum assistance payment that would have been received from the applicant's ... state of prior residence or the maximum assistance payment available to the applicant ... in this Commonwealth.

Pa. Stat. Ann., tit. 62, § 432(5)(ii) (Purdon 1996). The Commonwealth offers, in addition to cash assistance, a wide variety of other benefit programs; these include food stamps, medical assistance, job training programs, and others. Pet. App. 6a, 33a-34a. Benefits under these other programs are not affected by the twelve-month rule.

Against this background is the case of the Maldonado

family. Until May of 1997, the Maldonados and their six children lived in Puerto Rico. Mr. Maldonado worked as a mechanic, and the family also received nutritional assistance and medical assistance. Pet. App. 5a. Had the Maldonados been receiving cash assistance, the maximum amount of their grant in Puerto Rico would have been $304 per month. Pet. App. 6a, 33a. In May of 1997, Mr. Maldonado's job ended. Pet. App. 5a. Mr. Maldonado and his wife both have health problems, and that same month the Maldonados moved to Philadelphia in order to get better health care. Pet. App. 5a-6a. Almost immediately after their arrival in Pennsylvania, the Maldonados applied for welfare. Pet. App. 33a.

The Maldonados' application was approved. They received $304 per month cash assistance — the amount for which they would have been eligible in Puerto Rico — plus $720 per month in food stamps, plus medical assistance for which the Commonwealth was billed $1483.60 per month, plus one-time grants totaling $213 to defray job-search expenses.[3] Pet. App. 6a, 33a-34a. If they had satisfied the twelve-month residence rule, they would have been eligible for cash assistance of $836 per month. Pet. App. 6a, 33a.

2. The respondents filed this action in June of 1997 and moved for a preliminary injunction. The District Court, after a hearing, granted the motion and issued a memorandum and order accordingly.[4] Pet. App. 25a-77a.

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[3]These grants were returned after the Maldonados were both certified as temporarily unable to work. Pet. App. 6a, n.4, 34a.

[4]The District Court also certified a class at this time, with Mr. and Mrs. Maldonado as the class representatives. Pet. App. 37a-46a, (continued...)

The District Court began by noting the close relationship between Pennsylvania's twelve-month residence provision and the national effort at welfare reform:

> As most persons are aware, the winds of change have swept over the welfare laws of our country over the past few years. ... [T]hese changes in the national welfare laws, including the one year waiting period, are designed to give the states great flexibility in deciding how to reform their welfare programs; the idea being that states, under a decentralized system, will be able to improve the welfare system by experimenting with different programs on the state and local level.

Pet. App. 30a-32a, n.4. "Thus, [Pennsylvania's] statute ... is [not] an anomaly in the current reformation process but rather ... a statute which many states and the national government believe is central to their current reform efforts." Pet. App. 32a.

The District Court then turned to this Court's "right to travel" decisions, an area which the District Court found "unsettled and clearly in need of clarification by the ... Supreme Court." Pet. App. 47a-48a. The District Court was particularly distressed by this Court's "failure to ground the right to travel in a particular provision of the Constitution" which, in the District Court's view,

> has led to an unreasoned application of this

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[4](...continued)

76a.

> doctrine because the lower federal courts must apply this ... jurisprudence without fully considering the purposes behind the right to travel within its proper textual context.

Pet. App. 48a, n.11. The District Court then discussed at length the Court's decisions in *Shapiro v. Thompson*, 394 U.S. 618 (1969), and its progeny. Pet. App. 48a-58a. To the District Court, it seemed that in later decisions this Court had "subtly move[d] away from *Shapiro's* ... analysis," Pet. App. 54a, leading to a "splintered jurisprudence." Pet. App. 57a. Nevertheless, the District Court ultimately concluded that *Shapiro's* analysis still controlled "because ... it has never been overruled and its facts are similar to this case." Pet. App. 59a.

The District Court viewed *Shapiro* and its progeny as holding that

> a state law implicates the fundamental right to travel and therefore triggers strict scrutiny: (1) when impeding [interstate] travel is its primary objective; (2) when it actually deters such travel; or (3) when it uses any classification which serves to penalize the right to travel.

Pet. App. 59a (internal quotation marks omitted; bracketed matter the District Court's). The District Court considered these factors in turn.

The District Court first held that deterring interstate migration was not the "primary objective" of the statute. Pet. App. 59a-64a. Rather, its primary purpose was to encourage work and self-sufficiency, an "'admittedly permissible state objective.'" Pet. App. 59a-60a, *quoting Shapiro*, 394 U.S. at 634.

While the statute's other objective — to prevent Pennsylvania from becoming a "welfare magnet" — was "constitutionally impermissible" under *Shapiro*,[5] Pet. App. 60a-62a, this was not, in the District Court's view, the statute's "primary" objective. Pet. App. 62a-64a. Nor, the District Court said, had the respondents shown that Pennsylvania's twelve-month rule actually deters migration. Pet. App. 64a-65a.

Finally, the District Court turned to the question of whether the twelve-month rule "penalized" the exercise of the right to travel, and concluded that it did not. Pet. App. 65a-68a. While the District Court expressed some difficulty in applying *Shapiro's* "penalty" analysis, Pet. App. 67a-68a, n. 25, the District Court relied primarily on the fact that

> the new residents receive exactly what they were receiving or would have received in their state of prior residence. ...[This] is not a "penalty" in the traditional sense of the word — a lost benefit that the person would have received had he not exercised some constitutional right. ... Indeed, [respondents] here have lost no benefit that they would have received had they not exercised their right to migrate.

Pet. App. 67a. The District Court thus concluded that strict scrutiny was not appropriate. Pet. App. 68a.

Nevertheless, the District Court held that the statute was likely unconstitutional even under the more lenient rational basis

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[5]The District Court viewed this result as "counter-intuitive on an economic level," but nevertheless "mandated by the Supreme Court's constitutional law." Pet. App. 62a, n.21.

test, because it was not rationally related to its legitimate purpose of encouraging self-sufficiency. Pet. App. 68a-71a. In the District Court's view, *Shapiro* had already answered this question:

> the Court has ... expressly held that a one-year waiting period that is justified as a means of encouraging new residents to seek out and obtain employment sooner "provides *no rational basis* for imposing a one-year waiting period restriction on new residents only."

Pet. App. 69a, *quoting Shapiro*, 394 U.S. at 637-38 (emphasis added by District Court). The District Court also pointed to what he called "unsubstantiated assumptions" about the behavior of new residents, Pet. App. 69, and to the fact that the twelve-month rule resulted in different benefits levels for similarly situated applicants, depending on their State of origin. Pet. App. 70a-71a. He therefore preliminarily enjoined enforcement of the statute, even though he found that it was neither "unreasonable [n]or ill-intentioned." Pet. App. 75a. The petitioners appealed.

3. The Court of Appeals affirmed the District Court, but on different reasoning. The Court of Appeals agreed with the District Court that "the law with respect to the constitutional implications of the right to travel is unsettled and in need of clarification," Pet. App. 11a, but also agreed that it was required to follow *Shapiro*:

> We are mindful ... that ... several Supreme Court cases decided since *Shapiro* and *Maricopa*

> *County*[6] may call into question the vitality of strict scrutiny review of laws that burden the fundamental right to interstate travel and migration. Nevertheless, the Supreme Court has periodically admonished lower federal courts, and has recently "reaffirm[ed] its rule that 'if a precedent of th[e Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to th[e Supreme] Court the prerogative of overruling its own decisions.'" ... Because *Shapiro* and *Maricopa County* have never been overruled by the Court, we follow the Court's directive and conclude that they dictate the result of this case.

Pet. App. 22a-23a (citations omitted; bracketed matter the Court of Appeals').

Unlike the District Court, however, the Court of Appeals subjected Pennsylvania's statute to strict scrutiny because, unlike the District Court, the Court of Appeals concluded that the statute "penalized" the exercise of the right to travel within the meaning of *Shapiro*. Pet. App. 14a-19a. The Court of Appeals characterized this analysis as a "formidable task," Pet. App. 14a, since "the Supreme Court has never made clear the 'amount of impact required to give rise to the compelling-state-interest test.'" Pet. App. 15a, *quoting Maricopa County*, 415 U.S. at 256-57. Nevertheless, the Court of Appeals thought that the District Court had erred in his "penalty" analysis, by comparing

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[6]*Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974).

migrants' situation after exercising their right to migrate with what it would have been had they not done so. The Court of Appeals believed that "it is of no consequence that the Maldonados receive the same benefits that they would have received [had they not exercised the right to migrate]." Pet. App. 18a. Rather, "the appropriate penalty analysis must compare shorter-term with longer-term Pennsylvania residents." Pet. App. 17a.

Since Pennsylvania's twelve-month rule, by definition, treats recent residents less favorably than longer-term residents, the Court of Appeals had no difficulty in concluding that it constituted a "penalty" under *Shapiro*, and no difficulty in concluding that it could not survive strict scrutiny.[7] Pet. App. 19a-22a. The Court of Appeals thus affirmed the preliminary injunction.[8]

REASONS FOR GRANTING THE WRIT

I. Pennsylvania's Residency Statute Is Materially Identical to the California Statute Now Before the Court in *Anderson v. Roe.*

Within the last few years, the Court has twice granted certiorari to address the constitutionality of laws like

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[7]Indeed, as the Court of Appeals noted, the petitioners had not attempted to argue that the statute could survive strict scrutiny. Pet. App. 19a.

[8]The Court of Appeals, like the District Court, rejected respondents' alternative claim that the twelve-month rule violates the Privileges and Immunities Clauses of Article IV and the Fourteenth Amendment. Pet. App. 23a, n.9; Pet. App. 71a, n.27.

Pennsylvania's; one of those cases is now pending before the Court. *See Roe v. Anderson*, 134 F.3d 1400 (9th Cir. 1998), *cert. granted sub nom. Anderson v. Roe*, No. 98-97 (September 29, 1998); *Anderson v. Green*, 513 U.S. 557 (1995). The Court may therefore wish to defer action on this petition pending the outcome of *Anderson v. Roe*.

II. The Constitutionality of Residency Rules Like Pennsylvania's, Which Have Been Endorsed by Congress and Adopted by Many States, Presents an Important Question of Federal Law Which Should Be Reviewed by the Court.

As the District Court pointed out, Pennsylvania's twelve-month rule is "not a lone star in a galaxy of welfare legislation"; to the contrary, it is typical of laws which "many states and the national government believe [are] central to their current reform efforts." Pet. App. 30a-32a. The constitutionality of these laws presents an important issue which the Court should address.

After decades of experience with the old AFDC program, Congress concluded that "[t]here is little doubt that the current welfare system is a failure." H.R. Rep. No. 651, 104th Cong., 2nd Sess. (1996), p. 3.

> The welfare system contradicts fundamental American values that ought to be encouraged and rewarded: work, family, personal responsibility, and self-sufficiency. Instead, the system subsidizes dysfunctional behavior.... [It] discourages work [and] encourages long-term dependency.

Id., p. 4. In Congress' view, the then-current welfare system also

promoted out-of-wedlock childbearing and its attendant social pathologies, was associated with high crime rates, and — despite massive spending over the years — had not reduced the poverty rate, which had remained essentially unchanged since 1960. *Id.*, p. 3-5.

Congress therefore abolished AFDC and replaced it with TANF, a block grant program which "gives States the freedom to innovate in developing income support programs for welfare families that encourage personal responsibility and move welfare recipients into the work force." H.R. Rep. No. 651, 104th Cong., 2nd Sess. (1996), p. 5.

Congress was concerned, however, that in exercising their discretion under the new legislation, "States that want to pay higher benefits ... not be deterred from doing so by the fear that they will attract large numbers of recipients from bordering States." H.R. Rep. No. 651, 104th Cong., 2nd Sess. (1996), p. 1337. Congress knew that in *Shapiro* the Court had invalidated laws which attempted to deal with this problem by denying benefits altogether to new residents, but knew also that the Court "ha[d] not ruled on the question of paying *lower* amounts of aid for incoming residents." H.R. Rep. No. 651, 104th Cong., 2nd Sess. (1996), p. 1337 (emphasis added); H.R. Conf. Rep. No. 725, 104th Cong., 2nd Sess. (1996), p. 272-73 (same). Congress therefore adopted a more nuanced approach than that condemned in *Shapiro*, and provided that States could, for up to twelve months, apply to new residents the rules of their State of prior residence. 42 U.S.C. § 604(c), *quoted supra* at 4-4.

In response to Congress' authorization, at least eleven other States have adopted residency rules similar to

Pennsylvania's.[9] These rules, like Pennsylvania's, do not deny welfare benefits to new residents, but they do temporarily key those benefits to what the recipient would have received in the State of prior residence. They thus make welfare benefits a neutral factor in the decision whether to migrate from one State to another, and encourage recipients to look to work, rather than a larger welfare grant, as the way to get ahead.

Some States are already defending these rules against claims that they are inconsistent with *Shapiro's* analysis. *See Hicks v. Peters*, No. 98C3247 (N.D. Ill. July 18, 1998); *Westenfelder v. Ferguson*, 998 F.Supp. 146 (D. R.I. 1998) (granting preliminary injunction), *appeal docketed*, No. 98-1431 (1st Cir. May 14, 1998); *Ruffin v. Quasim*, No. C97-5767 FDB (W.D. Wash. Feb. 6, 1998) (granting preliminary injunction); *Sanchez v. Department of Human Services*, No. A-466-97T1F (N.J. Super. Ct. App. Div. July 8, 1998); *Davis v. Doth*, No. 62-C6-97-010231 (Minn. St. Dist. Ct. July 31, 1998), *appeal filed* (Minn. Ct. App. Nov. 3, 1998).

It seems likely that these challenges will continue to recur, and the legitimacy of this aspect of welfare reform will remain in doubt, until the Court resolves the issue. The Court should take this opportunity to do so.

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[9]*See* Cal. Wel. & Inst. Code § 11450.03; Ga. Code § 49-4-187; Ill. Ann. Stat. ch. 305, para. 5/11-30 (Smith-Hurd); Md. Regs. Code § 07.03.03.12E; Minn. Stat. Ann. § 256J.43; N.J. Stat. Ann. § 44:10-46; N.Y. Soc. Serv. Law § 117.3 (McKinney); N.D. Cent. Code § 50-09-29(*l*); Wash. Rev. Code Ann. § 74.08.025(c)(2). *See also* Fla. Stat. Ann. tit. 30, § 414.105(6) (for first 12 months, time limit on receipt of benefits is Florida limit or limit of State of prior residence, whichever is shorter); R.I. Gen. Laws § 40--5.1-8(e) (30% reduction in amount of cash benefits until 12 months consecutive residence).

III. The Court Should Take this Opportunity to Review Its "Right to Travel" Jurisprudence, Which Is Unsettled and Unsatisfactory.

With remarkable directness, both the District Court and the Court of Appeals described the difficulties they experienced in applying this Court's right-to-travel decisions, and the need for the Court to clarify this area of the law. Pet. App. 11a, 22a-23a, 47a-52a, 62a, n.21, 67a, n.25, 74a-75a. More remarkable still, comments of this kind have come to be almost routine from lower courts forced to grapple with these decisions. *See infra* at 19. These judicial distress signals point up the need for the Court to re-examine its right-to-travel jurisprudence.

The point of departure for the Court's modern right-to-travel jurisprudence is *Shapiro v. Thompson*, 394 U.S. 618 (1969). In *Shapiro*, the Court considered welfare laws from two States and the District of Columbia, each of which denied welfare benefits to applicants who had not resided within the jurisdiction for at least one year. *Id.*, at 620. The Court first held that

> in moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and *any classification which serves to penalize that right*, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.

Id., at 634 (emphasis added). Holding that the provisions in question — which resulted in a complete denial of benefits — did penalize the right to travel, the Court rejected every proffered justification of them, as reflecting governmental interests that were either insufficiently compelling or simply illegitimate. *Id.*,

at 627. Accordingly, the Court held that the provisions violated the Fourteenth Amendment's Equal Protection Clause. *Ibid.* The Court emphasized, however, that it was not invalidating waiting-period or residence requirements *per se*. To the contrary, in other contexts:

> [s]uch requirements may promote compelling state interests on the one hand, or, on the other, *may not be penalties* upon the exercise of the constitutional right of interstate travel.

Id., at 638, n.21 (emphasis added). *Accord Memorial Hospital v. Maricopa County*, 415 U.S. 250, 256-57 (1974).

In contrast to its approach in earlier cases involving travel,[10] the Court in *Shapiro* specifically declined to ground its analysis upon a constitutional text:

> We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision. It suffices that ... [it] "occupies a position fundamental to the concept of our Federal Union."

Id., at 630, *quoting United States v. Guest*, 383 U.S. 745, 757

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[10]For example, the *Passenger Cases*, 7 How. 283 (1849), relied on the Commerce Clause. *Paul v. Virginia*, 8 Wall. 168 (1869), relied on the Privileges and Immunities Clause of Art. IV, § 2. *Twining v. New Jersey*, 211 U.S. 78 (1908), relied on the Privileges and Immunites Clause of the Fourteenth Amendment. *Kent v. Dulles*, 357 U.S. 116 (1958) relied on the Due Process Clause of the Fifth Amendment. *See Shapiro*, 394 U.S. at 630, n.8 (citing these and other cases).

(1966). Nor, in shaping the contours of the right it had just asserted, did the Court look to historical practice or legal tradition. To the contrary: while the Court acknowledged that laws to discourage the influx of indigents into a given jurisdiction had been "prevalent" in American and English societies for "centuries," *Shapiro*, 394 U.S. at 628, n.7, the Court declared that this was a "constitutionally impermissible" purpose. *Id.*, at 631.

In the wake of *Shapiro*, then, much was left unclear: most importantly, the nature and source of the constitutional right to travel, and — flowing from this initial uncertainty — the kinds of laws which might constitute a "penalty" upon the exercise of that right, and the nature of the governmental interests which the Court might find compelling enough (or even legitimate) to justify such a "penalty."

Later cases have done little to dispel this uncertainty. By 1986, in the most recent of the Court's right-to-travel decisions, the plurality opinion was still maintaining that "[t]he textual source of the constitutional right to travel ... has proved elusive.... [W]e have not felt impelled to locate this right definitively in any particular constitutional provision," *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 903 (1986) (plurality opinion of Brennan, J.), while the dissenting Justices criticized that opinion's reliance on "some free-floating 'right to migrate'...." *Id.*, at 918 (O'Connor, J., dissenting).

> It is unfortunate that the Court has once again failed to articulate and justify by reference to textual sources a single constitutional principle or analysis upon which it can rely in deciding cases such as this.

Id., at 920 (O'Connor, J., dissenting).

This failure in turn has led to the recurrent criticism that *Shapiro's* approach, unbounded by text or tradition, simply cloaks ad hoc value judgments that should properly be left to elected officials. That criticism began with *Shapiro* itself, and has continued. *See, e.g., Shapiro*, at 654 (Warren, C.J., dissenting) ("The era is long past when this Court under the rubric of due process has reviewed the wisdom of ... congressional decision[s]"); *id.*, at 662 (Harlan, J., dissenting) ("I know of nothing which entitles this Court to pick out particular human activities, characterize them as 'fundamental,' and give them added protection...."); *Memorial Hospital v. Maricopa County*, 415 U.S. at 286 (Rehnquist, J., dissenting) ("the Court should observe its traditional respect for the State's allocation of its limited financial resources rather than unjustifiably imposing its own preferences"); *Attorney General of New York v. Soto-Lopez*, 476 U.S. at 925 (O'Connor, J., dissenting) ("the plurality's right to travel analysis [threatens to] swallow all the traditional deference shown to state economic and social regulation").

Moreover, *Shapiro's* approach has fallen increasingly out of step with the rest of the Court's jurisprudence. In general doctrinal terms, the Court has often expressed its "reluctan[ce] to expand the concept of substantive due process," *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992), preferring instead to rely wherever possible on specific textual constitutional provisions. *See, e.g., Graham v. Connor*, 490 U.S. 386 (1989) (claim of excessive force by law enforcement officer to be analyzed under Fourth Amendment rather than under substantive due process). And when the Court has resorted to substantive due process, it has "required a 'careful description' of the asserted fundamental liberty interest," and has been guided by "[o]ur

Nation's history, legal traditions, and practices." *Washington v. Glucksberg*, 117 S.Ct. 2258, 2268 (1997), *quoting Reno v. Flores*, 507 U.S. 292, 302 (1993). Even at the level of specific cases, it is difficult to reconcile the holding of *Shapiro* — that government may not withhold welfare benefits from people who exercise their right to migrate across state lines — with cases such as *Lyng v. Int. Union, United Automobile, Aerospace and Agricultural Implement Workers of America*, 485 U.S. 360 (1988) — that government may withhold them from people who exercise their right to strike.

Given all this, it is no surprise that lower courts, in addition to the courts in this case, have frequently expressed difficulty in applying *Shapiro's* analysis to new situations, and discomfort with its results. *See, e.g., Bethesda Lutheran Homes and Services, Inc. v. Leean*, 122 F.3d 443, 448 (7th Cir. 1997) ("seems odd ... to suppose the ... government constitutionally obligated to provide financial assistance to indigents in a form that will encourage them to seek ... distant states," but nevertheless required by *Shapiro*); *Lutz v. City of York*, 899 F.2d 255, 260-61 (3d Cir. 1990) (seven different constitutional sources have been suggested for the right to travel, but "the Court recently has provided precious little guidance on which of them presently gives rise to a right to travel, and the respective scope of each"); *Westenfelder v. Ferguson*, 998 F.Supp. at 151 nn. 5 & 6, 152 ("precise constitutional source of the right to travel has never been identified," "right-to-travel jurisprudence is somewhat muddled," "[p]recisely what constitutes a 'penalty' is uncertain"); *Jones v. Milwaukee County*, 485 N.W.2d 21, 26 & n.4 (Wis. 1992) ("cases addressing durational residency requirements have not clarified the amount of impact necessary to give rise to the compelling state interest standard.... [T]he parameters of *Shapiro's* penalty analysis ... remain undefined").

The Court should review this case, and take this opportunity to provide a firmer doctrinal base for the analysis of right-to-travel claims.

CONCLUSION

The Court should grant the petition.

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December 1, 1998

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Filed September 9, 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-1893

EDWIN MALDONADO; MARIA DELORES MALDONADO, individually and as next friends of Ana Maldonado, Pablo Maldonado, Edwin Maldonado, Rey Maldonado, Yesenia Maldonado, and Jose Maldonado, and on behalf of all others similarly situated; MARIA ORTIZ; MICHAEL ORTIZ, individually and as next friends of Julie Ortiz, Michael Ortiz, and Angelica Ortiz, and on behalf of all other similarly situated; KENSINGTON WELFARE RIGHTS UNION; PHILADELPHIA WELFARE RIGHTS ORGANIZATION, on behalf of themselves and their members; TRAVELER'S AID SOCIETY OF PHILADELPHIA, individually and on behalf of its clients

v.

FEATHER O. HOUSTOUN, Secretary of the PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE; DON JOSE STOVALL, Executive Director of the PHILADELPHIA BOARD OF ASSISTANCE, both in their official capacities, Appellants

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Appeal from the United States District Court for the Eastern District of Pennsylvania D.C. No. 97-cv-04155.

Argued: July 21, 1998.

Before: STAPLETON, ROSENN, *Circuit Judges*, and

RESTANI, *Judge*, United States Court of International Trade*

(Filed September 9,1998)

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OPINION OF THE COURT

ROSENN, Circuit Judge.

This appeal presents a significant constitutional question implicating an aspect of Pennsylvania's recent amendment to its public assistance benefits legislation. Pennsylvania made the change during a recent wave of federal and state welfare reform legislation which swept the nation calling for a reduction in overall welfare expenditures. Specifically, we must decide the

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*The Honorable Jane A. Restani, Judge, United States Court of International Trade, sitting by designation.

constitutionality of § 9(5)(ii) of Pennsylvania's Act 35 of 1996. *See* Pa. Stat. Ann., tit. 62, § 432(5)(ii). It mandates that an eligible family arriving in Pennsylvania from another state shall, during its first twelve months of bona fide residence, receive as cash benefits the lesser of: (1) the benefit level available to similarly situated Pennsylvania residents of twelve months or more, or (2) the benefit level the family would have been eligible to receive in their prior state had they not moved to Pennsylvania.

In 1997, several months after the passage of this legislation, Maria and Edwin Maldonado and their six minor children migrated to Pennsylvania from Puerto Rico. They became eligible for public assistance benefits but were informed that the cash benefits allowance available to them would be substantially lower than the benefits provided to similarly situated long-term Pennsylvania residents.[1]

Shortly thereafter, the Maldonados and several organizations that represent their interests (collectively, the "Maldonados"), instituted a class action against Feather O. Houstoun, Pennsylvania's Secretary of Public Welfare, and Don Jose Stovall, Executive Director of the Philadelphia Board of Assistance, both in their official capacities (collectively, the "Commonwealth"), in the United States District Court for the Eastern District of Pennsylvania. The Maldonados sued pursuant to 42 U.S.C. § 1983, seeking declaratory and injunctive relief, claiming that Pennsylvania's two-tier welfare scheme violates

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[1]Pennsylvanians with a twelve month residence were eligible for cash benefits of $836 but the Maldonado family, because of their less than a twelve month residence, was eligible for cash befits of only $304 per month, the amount they would have been allowed in Puerto Rico.

their constitutional rights to travel, to equal protection, and to non-discriminatory treatment under the Privileges and Immunities Clause. The district court held that the scheme did not appear to be supported by a rational basis, and thus likely violated the Fourteenth Amendment's Equal Protection Clause. Therefore, the court preliminarily enjoined enforcement of the two-tier scheme and certified the class, with the Maldonados as class representatives. The Commonwealth timely appealed the injunction. We affirm, although our analysis differs.

I.

The relevant facts of this case are for the most part undisputed. In May 1996, after several attempts to pass similar measures failed throughout the early 1990s, Pennsylvania, as part of the state's broad-scale welfare reform, enacted Section 9(5)(ii), governing public assistance benefits to eligible families that have resided in Pennsylvania for less than one year. Section 9(5)(ii) provides that during the first twelve months of residence in Pennsylvania, an eligible family's cash assistance benefits are limited to the lesser of (1) the benefit level that family would have received in its prior state of residence, or (2) the benefit level available to otherwise similarly situated longterm Pennsylvania residents.[2] Because Pennsylvania grants larger cash

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[2]Section 9(5)(ii), in its entirety, reads as follows:

> Cash assistance for applicants and recipients of aid to families with dependent children who have resided in this Commonwealth for less than twelve months shall not exceed the lesser of the maximum assistance payment that would have been received from the applicant's or recipient's state of prior residence or the maximum assistance payment available
>
> (continued...)

benefits than 40 other states, under this twotier scheme, a typical eligible family moving to Pennsylvania would lose anywhere from over 60%, to as little as 2%, of their cash benefits for the first twelve months that they reside in the state.

Pennsylvania's legislation received considerable reassurance when several months later, in August 1996, Congress passed landmark welfare reform legislation known as the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), 42 U.S.C. §§ 601, *et seq*. The PRWORA dramatically changed the climate for welfare programs in this country and encouraged states to adopt restrictive cash benefit programs of the type contained in Pennsylvania's Act 35 for those relocating from another state. Among other things, the PRWORA changed the basic funding format for state Temporary Assistance to Needy Families ("TANF")[3] plans to awards of block grants, expressly terminating the prior program's entitlement nature. Especially relevant to this appeal is Section 604(c) of the PRWORA, which explicitly authorized two-tier cash benefits provisions like that enacted by Pennsylvania. Section 604(c) authorized states to treat new residents differently than longer-term residents.

Prior to May 1997, Plaintiff Edwin Maldonado worked as a mechanic in Puerto Rico and supported his family with his salary plus government-provided nutritional and medical assistance. In May 1997, Maldonado's job ended. He and his wife both had health problems, and therefore in May 1997, they

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[2](...continued)
to the applicant or recipient in this Commonwealth.

[3]TANF replaced the former federal welfare program popularly known as Aid to Families with Dependent Children ("AFDC").

and their six children moved from Puerto Rico to Philadelphia, Pennsylvania, where Mr. Maldonado was born and spent part of his childhood, to seek better health care.

Shortly after establishing residence in Pennsylvania, the Maldonados applied for TANF benefits. The Pennsylvania Department of Public Welfare ("DPW") approved their application and also certified that both Mr. and Mrs. Maldonado temporarily were unable to work. Under Pennsylvania's revised welfare scheme, the Maldonados qualified for monthly cash benefits of $304, the amount they would have received in their prior place of residence, Puerto Rico, $720 in food stamps and medical benefits paid by the state of $1,483.60, plus a one- time grant of $213 to defray job-search expenses.[4] Had the Maldonados been residents of Pennsylvania for at least twelve months, they would have been eligible for cash benefits of $836 per month instead of the $304 in benefits that they actually received, a reduction of almost 64%.

As a result of the DPW's benefits decision, the Maldonados sued the Commonwealth on June 19, 1997, seeking a temporary restraining order (TRO) and declaratory and injunctive relief. They claimed that Pennsylvania's two-tier durational residency structure violated their fundamental right to travel, their rights under the Equal Protection Clause of the Fourteenth Amendment, and their rights under the Privileges and Immunities Clause of Article IV and the Fourteenth Amendment.

After denying the plaintiffs' motion for a TRO, the court held a two-day hearing on the application for a preliminary

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[4]The Maldonados returned the $213 grant as both were certified temporarily unable to work.

injunction. On October 6, 1997, after considering the memoranda, transcripts, exhibits, and other evidence contained in the sizeable and well-developed record, the district court certified the class and preliminarily enjoined enforcement of Pennsylvania's two-tier durational residency requirement. The court, applying rational basis Equal Protection analysis, held the law irrational. It found that the class members were likely to succeed on the merits of their constitutional claim that the class would suffer irreparable harm absent the injunction, rejected the Commonwealth's fiscal harm arguments, and found that the public interest would be best served by granting the injunction.[5]

The Commonwealth timely appealed. The district court placed the action in civil suspense pending resolution of this appeal.[6]

II.

On appeal, when considering the district court's grant of a preliminary injunction, we review the court's legal conclusions de novo, its findings of fact for clear error, and its ultimate decision to grant or deny the preliminary injunction for an abuse of discretion. *See, e.g., Anderson v. Davila*, 125 F.3d 148, 159 (3d Cir.1997); *New Jersey Hosp. Ass'n v. Waldman*, 73 F.3d

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[5]On October 30, 1997, the court granted in part and denied in part the Maldonados' motion to amend their complaint to include two additional families as plaintiffs and class representatives, allowing one family--the Ortizes--to join and denying the other.

[6]The district court had jurisdiction over this civil rights action pursuant to 28 U.S.C. §§ 1331 and 1343. This Court has jurisdiction over the district court's grant of a preliminary injunction pursuant to 28 U.S.C. § 1292(a)(1).

509, 512 (3d Cir.1995). Because this appeal presents solely legal questions pertaining to the constitutionality of Section 9(5)(ii) of Pennsylvania's welfare act, our review is plenary. Ordinarily, limited review is appropriate at the preliminary injunction stage of a constitutional challenge to a state statute, but since the issue is legal and the facts are well established, we "need not abstain from addressing the constitutional issue." *Thornburgh v. American College of Obst. and Gyn.*, 476 U.S. 747, 756 (1986).

A.

The Commonwealth succinctly frames the appellate issue in these words: "Whether Pennsylvania violates the Constitution by providing that, for one year after their arrival in Pennsylvania, applicants for certain welfare benefits may receive only the amount they would have received in their state of prior residence." Thus, we are called upon only to determine the constitutionality of the state statute; the federal statute, PRWORA, is not before us. From a procedural perspective, the district court decided the case on the Maldonados' motion for a preliminary injunction. A district court should grant a preliminary injunction only if (1) the plaintiff is likely to succeed on the merits; (2) denial will result in irreparable harm to the plaintiff; (3) granting the injunction will not result in irreparable harm to the defendant; and (4) granting the injunction is in the public interest. *See Merchant & Evans, Inc. v. Roosevelt Bldg. Prods. Co., Inc.*, 963 F.2d 628, 632-33 (3d Cir.1992). After weighing these factors, and although the district court found that all four weighed in the Maldonados' favor, it relied almost exclusively on the first, the likelihood of success on the merits. Thus, if the court incorrectly determined that the Maldonados were likely to succeed on the legal merits of their claim, it erred in granting the injunction. Because the Commonwealth limits its appeal to the merits issue, we need only address the propriety of

the district court's legal conclusions.

B.

Under the Equal Protection clause, no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Pennsylvania's twotier act warrants equal protection analysis because it classifies bona fide residents of the state into two groups when determining welfare benefits. In determining the extent of cash welfare benefits, Pennsylvania created two classes of indigent residents indistinguishable from each other except that one is composed of residents who have resided in the state a year or more, and the other of residents who have resided in the state less than a year.

Even though a state has created a classification, not all classifications are per se unconstitutional or automatically subject to heightened judicial scrutiny. If Pennsylvania's durational residency classification " 'neither burdens a fundamental right nor targets a suspect class, we will uphold [it] so long as it bears a rational relation to some legitimate end.' " *See Vacco v. Quill*, 117 S.Ct. 2293, 2297 (1997) (quoting *Romer v. Evans*, 517 U.S. 620, 631 (1996)); *see also San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973). However, if the two-tier scheme is drawn on suspect lines or does sufficiently burden a fundamental right, it is subject to strict scrutiny and will pass constitutional muster only if it is narrowly tailored to serve a compelling state interest. *See, e.g., Dunn v. Blumstein*, 405 U.S. 330, 335 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

The Commonwealth argues that the district court correctly held that Pennsylvania's two-tier durational residence requirement does not penalize the plaintiffs' fundamental right

to travel or their right to equal protection, and thus is not subject to strict scrutiny. Instead, it argues that the court erred in holding that the scheme was unconstitutional under rational basis review when it found that it was not related to a legitimate governmental interest. The Commonwealth contends that the statute is rationally related to furthering the Commonwealth's legitimate interest in fostering the selfsufficiency and work ethic of its citizens, including its newest citizens. By leaving recent interstate migrants with the same benefit level as they were in their former place of residence, the statute encourages them to seek work, rather than increased benefits. The Maldonados, not surprisingly, argue that although the court was correct in holding that the statute did not pass rational basis review, that the twotier scheme penalizes the plaintiffs' fundamental right to travel, and thus should be subject to strict scrutiny. Neither party claims that the scheme classifies on suspect lines.

C.

The constitutional right to travel is not contained in the text of the Constitution, and a majority of the Supreme Court of the United States has never agreed upon its textual source. Analytically, the Court has recognized that the historical foundation upon which this Republic was structured was that we are all citizens of the United States, one people, and, as such, we "must have the right to pass and repass through every part of [the country] without interruption, as freely as in our own States." *See The Passenger Cases*, 48 U.S. (7 How.) 283, 12 L.Ed. 702 (1849). This right to pass freely from one state to another was one of the attractive features that persuaded the colonists to unite into a nation. The Supreme Court repeatedly and consistently has recognized a fundamental right to interstate travel, *see e.g., United States v. Guest*, 383 U.S. 745 (1966); *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867); *The Passenger Cases*, 48

U.S. 283 and that inextricably implicated therein is the right to migrate to and settle in another state. *See, e.g., Jones v. Helms*, 452 U.S. 412, 417-19 (1981); *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974); *Dunn v. Blumstein*, 405 U.S. 330, 338; *Shapiro*, 394 U.S. 618.

Regrettably, however, the law with respect to the constitutional implications of the right to travel is unsettled and in need of clarification. The Court has at times subjected durational residence laws that impinge on the right to travel to strict scrutiny, *see Maricopa County*, 415 U.S. 250; *Dunn v. Blumstein*, 405 U.S. 330; *Shapiro*, 394 U.S. 618, and at other times to what appears to be some form of a heightened rational basis test.[7] Furthermore, although never formally recognized by the Court, we have previously noted that *Shapiro* and its progeny arguably were analyzed, at least in part, as if the classifications at issue were somewhat suspect, in that they "penalized a group of people on the basis of their having exercised a constitutionally protected right to travel." *See Lutz v. City of York, Pennsylvania*, 899 F.2d 255, 265 (3d Cir.1990); *see also* Thomas R. McCoy, *Recent Equal Protection Decisions--Fundamental Right to*

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[7]*See Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985); *Zobel v. Williams*, 457 U.S. 55 (1982); *see also Coburn v. Agustin*, 627 F.Supp. 983, 988-94 (D.Kan.1985) (discussing the Supreme Court's use of "heightened rational basis scrutiny"); *Alvarez v. Chavez*, 118 N.M. 732, 886 P.2d 461, 466-67 (N.M.Ct.App.1994) (same); Laurence H. Tribe, *American Constitutional Law*, § 16-3 (2d ed.1988) (discussing the "new, more penetrating character" of the rational basis test, which he labels "covertly heightened scrutiny"); Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 Ind. L.J. 779, 787-92 (1987) (discussing "rational basis with bite in the right-to-travel context").

Travel or "Newcomers" as a Suspect Class?, 28 Vand. L.Rev. 987 (1975); Todd Zubler, *The Right to Migrate and Welfare Reform: Time for Shapiro v. Thompson to Take a Hike*, 31 Val. U.L.Rev. 893, 904-05 (1997).

In the seminal right to travel case of *Shapiro*, 394 U.S. 618 the Court subjected to strict scrutiny several state laws that created one-year durational residence requirements as a prerequisite to eligibility for any welfare benefits. In construing a strikingly similar Pennsylvania statute, the Court in *Shapiro* expressly held that "any classification which serves to penalize the exercise of th[e] right [to travel], unless shown to be necessary to promote a compelling governmental interest, is unconstitutional." *Id.* at 634. The *Shapiro* Court reasoned that the one-year residence requirement imposed on recent migrants as a condition of welfare eligibility, which resulted in a complete denial of benefits for those persons residing in the state for less than one year, was unconstitutional, because it discriminated based solely on length of residency in the state and thus unconstitutionally burdened the plaintiffs' fundamental right to interstate travel and migration.

Five years later, in *Maricopa County*, the Court, applying *Shapiro*, similarly subjected to strict scrutiny an Arizona law that required one-year residency in a county as a prerequisite to receiving free nonemergency hospital or medical care. 415 U.S. 250. The *Maricopa County* Court acknowledged that "any durational residence requirement impinges to some extent on the right to travel" and thus not all durational residency requirements are per se unconstitutional. *Maricopa County*, 415 U.S. at 256. The Court further stressed, however, that "the right of interstate travel must be seen as insuring new residents the same right to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents." *Id.* at 261. Thus,

because it found that "medical care is as much 'a basic necessity of life' to an indigent as [the] welfare assistance" at issue in *Shapiro*, and that the classification penalized those persons who had "exercised their constitutional right of interstate migration,[the statute] must be justified by a compelling state interest." *Id.* at 258-59 (citation omitted). The Court then struck down the law, finding that the Arizona statute created "an 'invidious classification' that impinges on the right of interstate travel by denying newcomers 'basic necessities of life,' " and was not supported by compelling justifications or narrowly drawn. 415 U.S. at 269.

Since *Shapiro* and *Maricopa County*, a majority of the Court has never subjected a durational residency requirement to strict scrutiny. Instead, the Court sometimes employs some form of rational basis review, and, occasionally, analyzes such laws without even implicating the fundamental right to travel. *See, e.g., Attorney General of New York v. Soto-Lopez,* 476 U.S. 898 (1986) (four of the justices applied strict scrutiny in an opinion which did not command a majority); *Hooper v. Bernalillo County Assessor,* 472 U.S. 612 (1985); *Zobel v. Williams,* 457 U.S. 55 (1982). This tendency, however, does not establish that rational basis is now the appropriate test when evaluating durational residency requirements as applied to welfare benefits. The Court in those cases merely employed its version of rational basis analysis because the challenged laws could not even survive rational basis review. Thus, the Court found it unnecessary to subject the laws to heightened scrutiny. *See, e.g., Soto-Lopez,* 476 U.S. at 904 (explaining that because the "contested classifications [in *Zobel* and *Hooper*] did not survive even rational basis, [the Court] had no occasion to inquire whether enhanced scrutiny was appropriate"). The holdings of *Shapiro* and *Maricopa County* subjecting durational residency requirements that impinge on the right to travel to strict scrutiny,

however, have never been overturned and thus are binding precedent to which we adhere in deciding this factually and legally similar case.

In deciding whether a durational residency requirement sufficiently impinges upon the right to travel or migrate to trigger strict scrutiny, the Court looks to see whether the challenged law's "primary objective" is to impede interstate travel; whether it "penalize[s] the exercise of that right;" or whether it "actually deters such travel." *Soto-Lopez*, 476 U.S. at 903 (plurality opinion) (internal quotations and citations omitted); *see also Shapiro*, 394 U.S. at 628-34. Here, relying on the legislature's express intent "to promote the self-sufficiency of all the people of the Commonwealth," Pa. Stat. Ann., tit. 62, § 401(a), the district court, in a very thoroughly drafted opinion, agreed with the Commonwealth that the statute's primary objective was not to deter interstate travel and migration. The court also found that the plaintiffs offered no conclusive evidence that the durational residency requirement actually deters the right. Even accepting the district court's conclusions of law that travel deterrence was not the statute's primary objective and the court's finding that the plaintiffs' failure to establish that the duration requirement actually deterred, we are still left with the formidable task of determining whether having exercised the Constitutional right to travel, the plaintiffs were *penalized* because of the duration of their residence.

The district court ultimately employed rational basis review because it found that the Maldonados could not "demonstrate that Section 9(5)(ii)'s durational residence requirement results in a 'penalty' on the right to interstate migration." The court distinguished this case from *Shapiro* on the ground that scheme at issue in *Shapiro* resulted in a total deprivation of welfare benefits needed to obtain "life's basic

necessities," whereas here the Pennsylvania statute amounted only to a reduction in cash benefits. The law did not deny the Maldonados other welfare benefits. The court compared the Maldonados' position before and after exercising the right, and found it significant that the Maldonados continued to be eligible for TANF benefits at the same level they would have received in Puerto Rico (plus food stamps, medical benefits, and other assistance). Accordingly, the court concluded that

> the lower benefits do not make new residents any worse off because [they] receive exactly what they were receiving or would have received in their state of prior residence. Thus, the "penalty" that plaintiffs allege is imposed on them for exercising their right to migrate interstate is not a "penalty" in the traditional sense of the word--a lost benefit that the person would have received had he not exercised some constitutional right. Indeed, the plaintiffs here have lost no benefit that they would have received had they not exercised their right to migrate.... Thus, ... [this court] finds that Section 9(5)(ii)'s multi-tier durational residency does not act as a penalty on plaintiffs' right to interstate migration.

Maldonado v. Houstoun, 177 F.R.D. 311, 331-32 (E.D.Pa.1997).

Although the Supreme Court has never made clear the "amount of impact required to give rise to the compelling-state-interest test," *Maricopa County*, 415 U.S. at 256-57, we are persuaded that the district court's "penalty" analysis in this case misconstrued the import of the relevant case law and used an improper comparison. Thus it erroneously concluded that

Pennsylvania's two-tier welfare scheme does not amount to a penalty. First, similar to the Pennsylvania scheme under review here, two of the three state laws that the Court struck down in *Shapiro* offered "partial assistance ... to some new residents and full assistance ... to other new residents." *See Shapiro*, 394 U.S. at 695; *see also Zobel*, 457 U.S. at 60-66 (holding unconstitutional state distribution of benefits to citizens on a sliding scale based on how long they have lived in the state); Erwin Chemerinsky, *Constitutional Law: Principles and Policies*, § 10.7, at 703-04 (1997) ("The Supreme Court ... has ruled that laws that do not totally deny benefits, but provide less to new arrivals are unconstitutional."). Thus, that Pennsylvania's scheme does not amount to a complete denial of cash benefits and that it provides recent immigrants with some amount of welfare benefits other than cash assistance is not dispositive.

Second, and more importantly, as demonstrated by *Shapiro, Maricopa County*, and every equal protection case, the appropriate comparison is between those persons subject to the classification and those persons who are similarly situated but for the classification. Here, whether Pennsylvania's two-tier scheme amounts to a penalty must be determined by comparing new residents of Pennsylvania and other similarly situated longer-term Pennsylvania residents, and not by comparing new residents of Pennsylvania and those of their former state. Once the Maldonados established bona fide residency in Pennsylvania, a comparison of residents of Puerto Rico with long-term Pennsylvania residents for equal protection purposes is neither sound nor logical; it is not a comparison between analogues. Residents of Puerto Rico have no claim to Pennsylvania welfare benefits or to equal protection under Pennsylvania's welfare laws until they move from Puerto Rico and establish a bona fide residence in Pennsylvania. Only once those persons reside in Pennsylvania is the classification applicable to them.

Although the level of scrutiny to which durational residence requirements are subject may not be applied similarly in all contexts, that the appropriate comparison is between short- and longer-term Pennsylvania residents is well-established by the foregoing body of Supreme Court precedent. Moreover, our conclusion that the appropriate penalty analysis must compare shorter-term with longer-term Pennsylvania residents has been reached by numerous other federal and state courts that have considered this precise, or substantially similar, issue.[8]

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[8] *See Roe v. Anderson*, 966 F.Supp. 977, 984-85 (E.D.Cal.1997), *aff'd*, 134 F.3d 1400, 1404-05 (9th Cir.1998), *petition for cert. filed*, (U.S. July 9,1998) (No. 98-97); *Green v. Anderson*, 811 F.Supp. 516, 521 (E.D.Cal.1993), *aff'd*, 26 F.3d 95 (9th Cir.1994), *judgment vacated as unripe*, 513 U.S. 557 (1995) (per curiam); *Westenfelder v. Ferguson*, 998 F.Supp. 146, 154 (D.R.I.1998); *Mitchell v. Steffen*, 504 N.W.2d 198, 201-02 (Minn.1993); *Sanchez v. Department of Human Services*, 314 N.J.Super. 11, --- A.2d ----, A-466- 97T1F, 1998 WL 391584, at *5 (N.J.Super.Ct.App.Div. July 8, 1998); *Brown v. Wing*, 170 Misc.2d 554, 649 N.Y.S.2d 988, 995 (N.Y.Sup.Ct.1996), *aff'd*, 241 A.D.2d 956, 663 N.Y.S.2d 1025 (1997); *see also Aumick v. Bane*, 161 Misc.2d 271, 612 N.Y.S.2d 766 (N.Y.Sup.Ct.1994); Robert C. Farrell, *Classifications That Disadvantage Newcomers and the Problem of Equality*, 28 U. Rich. L.Rev. 547, 609 (1994) (arguing that the "relevant comparison ... [is] between newcomers and the established residents of the new state"); *cf. Hicks v. Peters*, --- F.Supp. ----, No. 98C3247, 1998 WL 424176 (N.D.Ill. July 17, 1998) (declining to reach the issue of whether the Illinois durational residence statute imposes a penalty because it failed rational basis review). *But cf. Jones v. Milwaukee County*, 168 Wis.2d 892, 485 N.W.2d 21 (Wisc.1992) (finding that a 60 day durational residency requirement for general relief benefits is "substantially less onerous than the one year waiting period of *Shapiro*, ... does not operate to penalize an individual's right to travel," and passes rational

(continued...)

From a constitutional standpoint, it is of no consequence that the Maldonados receive the same benefits that they would have received in Puerto Rico. Pennsylvania's two-tier welfare scheme penalizes the Maldonados for having exercised their right to travel by treating them significantly less favorably than other similarly situated longer-term Pennsylvania residents solely because they exercised that right more recently.

It is well-established "that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution." *Harman v. Forssenius*, 380 U.S. 528, 540 (1965); *accord Dunn v. Blumstein*, 405 U.S. at 341. This, however, is exactly what Pennsylvania's two- tier durational residence scheme does. The $532 monthly reduction in the Maldonados' Pennsylvania benefits, based solely on their newly arrived status amounts to a 64% reduction in cash benefits and plainly penalizes them for having exercised their right to migrate into the state.

This point is further reinforced by the holdings in *Zobel, Hooper,* and *Soto-Lopez,* where the Court held unconstitutional state benefit schemes that were unique to the states involved and which did not even exist in the plaintiffs' prior state of residence. *See, e.g., Soto-Lopez*, U.S. 476 at 907, 911-12 ("Once [out-of-staters] establish bona fide residence in a State, they become the State's 'own' and may not be discriminated against solely on the basis of [the date of] their arrival in the State.... For as long as [the State] chooses to offer [a benefit to its residents,] the Constitution requires that it do so without regard to [time of] residence.") (citations and internal quotations omitted); *Hooper*,

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[8](...continued)
basis review).

472 U.S. at 623 ("The State may not favor established residents over new residents based on the view that the State may take care of 'its own,' if such is defined by prior residence."). Thus, from a constitutional viewpoint, the level of benefits available to the claimants in the state of their prior residence is irrelevant. What the Court found significant, however, was the difference in benefits provided to the claimants in the state of their new residence based solely on residential duration. Here too, newer residents, such as the Maldonados, plainly are "penalized" for having exercised their right to travel and migrate.

Thus, because Pennsylvania's durational residency requirement discriminates against newly arrived residents and penalizes their fundamental right to travel and migrate, we hold that Pennsylvania's welfare durational requirement is subject to strict scrutiny. Accordingly, to pass constitutional muster, the Commonwealth must show that the residential requirement is necessary to promote a compelling state interest and is narrowly drawn to meet that end. Partly because the Commonwealth argues that the law should be reviewed under rational basis analysis, it has not presented anything even remotely resembling a compelling interest which would justify the law or shown that it is narrowly tailored to meet its asserted ends.

First, one of the purposes of the statute articulated by the Commonwealth in the district court is to prevent Pennsylvania from becoming a "welfare magnet." The district court found this purpose clearly unconstitutional under *Shapiro* and its progeny. We agree, and it does not warrant additional discussion. *See, e.g., Shapiro*, 394 U.S. at 629. Second, the Commonwealth's argument that the purpose of the durational residency requirement, "and indeed of Pennsylvania's entire assistance program, is to encourage work and self-sufficiency over dependency," is unconvincing. Although unquestionably the

encouragement of self-sufficiency and work is a laudable and legitimate state goal, the Commonwealth has not demonstrated that this is a compelling interest or that a two-tier scheme is necessary to achieve that end. Even assuming *arguendo* that the interest is compelling, the scheme clearly is not narrowly drawn to achieve that goal and arguably, as the district court found and as applied by the Supreme Court, is not even rationally related to that purpose.

For instance, the Commonwealth has not demonstrated why newly arrived residents are more in need of "encouragement" to join the work force than longer-term residents. If encouraging work truly were the goal, and reduced benefits during a waiting period accomplished this goal, all residents should be subject to a waiting period, not just new residents. *See Shapiro*, 394 U.S. at 637 ("A state purpose to encourage employment provides no rational basis for imposing a one-year waiting-period restriction on new residents only."). Furthermore, the scheme does not encourage all new residents but only "encourages" those new residents who arrive from states that provide lower benefits than Pennsylvania. Moreover, and significantly, immigrants from abroad receive no encouragement for under Pennsylvania law they are eligible for the same benefits as long-term residents. Additionally, the scheme's irrationality is demonstrated by its application to persons who migrated to Pennsylvania while employed, but due to no fault of their own, such as layoffs or plant closings, became unemployed within their first twelve months in the state. The law's irrationality is further highlighted as the scheme applies even to those certified by the Commonwealth as being temporarily or permanently physically disabled or otherwise incapable of working, such as the Maldonados. There simply is no rational reason, let alone a compelling reason, to assume that only new residents from states that offer lesser benefits than

Pennsylvania need "encouragement" to seek work and selfsufficiency.

Amici curiae's proffered reason, that the scheme is justified by differing expectation and reliance interests--*i.e.*, newcomers can more easily adjust to cuts in welfare benefits through their choice of communities and lifestyles than longer-term residents who expect to have, and rely on, the safety net of higher benefits--is not sufficiently compelling. Even if we assume that many newer residents can more easily adjust their lifestyles to reduced benefits than those with longstanding ties to a particular area, an assumption that is highly speculative, the Commonwealth again has not demonstrated a compelling interest that justifies what may amount to a greater than 60% reduction in an indigent family's cash benefits required to purchase many of life's necessities.

Furthermore, the legislative scheme is not narrowly tailored to meet this purpose, as it does not take into account the myriad of differences in individual personal and financial situations. For example, most people who own homes, those who have fixed residential lease obligations, or those who have countless other longer-term financial obligations can less easily adjust to reduced benefits compared to those persons without similar obligations. The Commonwealth could use means, need-based, or other testing to determine if a particular applicant actually can adjust to reduced welfare benefits. Under any of numerous scenarios, it is likely that an eleven-month resident of Pennsylvania who unexpectedly finds herself in need of welfare benefits will find it just as difficult to survive on reduced benefits as will a twelve-month resident. Amici curiae have presented no compelling reason to assume that *all* newer residents, and *only* newer residents, are more able to easily adjust to and survive on reduced welfare benefits, nor have they demonstrated that the

scheme is narrowly tailored to affect only those able to adjust to and survive on reduced welfare benefits. Thus, it is obvious that the Commonwealth (and Amici) has failed to demonstrate that its twelve-month durational residency requirement is necessary to promote a compelling state interest, or that the legislation is narrowly drawn to meet its stated objections.

We agree with the district court that there is no constitutional right to welfare benefits, *Dandridge v. Williams*, 98 U.S. 471, 485 (1970), and none is claimed. We are also aware of a state's legitimate interest in preserving public funds. When, however, a state makes welfare benefits available for its indigent, *Shapiro* and *Maricopa County* make it clear that the preservation of the public fisc may not be achieved by an invidious distinction between classes of its citizens.

We are mindful, however, as explained by the district court, that the opinions in several Supreme Court cases decided since *Shapiro* and *Maricopa County* may call into question the vitality of strict scrutiny review of laws that burden the fundamental right to interstate travel and migration. Nevertheless, the Supreme Court has periodically admonished lower federal courts, and has recently "reaffirm[ed] its rule that 'if a precedent of th[e Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to th[e Supreme] Court the prerogative of overruling its own decisions.' " *See Agostini v. Felton*, 521 U.S. 203 (1997) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)). Because *Shapiro* and *Maricopa County* have never been overruled by the Court, we follow the Court's directive and

conclude that they dictate the result of this case.[9] We note, however, that our opinion is in no way meant to pass judgment on the wisdom or desirability of the Pennsylvania legislature's attempt at welfare reform.

III.

In conclusion, we affirm the district court's order that the Maldonados have shown that they were likely to succeed in proving that Commonwealth's twelve-month durational residence requirement is unconstitutional. Thus, the court's grant

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[9]On appeal, the Maldonados once again argue that Section 9(5)(ii) violates the Privileges and Immunities Clauses of Article IV and the Fourteenth Amendment. As shown by the almost complete lack of citation to authority in their brief, this argument is almost completely without merit. But *see Zobel*, 457 U.S. at 71-81 (O'Connor, J. concurring) (finding the right to travel rooted in the Privileges and Immunities Clause). The Supreme Court has consistently interpreted Article IV, § 2--the Privileges and Immunities Clause--to be a limit on the ability of a state to discriminate against out-of-state residents. The Clause, "in effect, prevents a State from discriminating against citizens of other States in favor of its own." *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 511, 59 S.Ct. 954, 83 L.Ed. 1423 (1939). As a necessary prerequisite for the Privileges and Immunities Clause to apply, it must be shown that a state discriminated against a citizen of another state. *See, e.g, United Bldg. & Constr. Trades Council v. Mayor and Council of Camden*, 465 U.S. 208, 218 (1984); *Zobel*, 457 U.S. at 59 n. 5. Here, by contrast, the Pennsylvania statute is applicable only to bonafide Pennsylvania-state residents and does not discriminate against nonresidents in any way. The only way to fall under the challenged scheme is to first become a resident of the Commonwealth of Pennsylvania. Accordingly, the Privileges and Immunities Clause has no application to the issues presented by this appeal.

of a preliminary injunction was not an abuse of discretion. We conclude, however, that the court erroneously subjected the law to rational basis analysis instead of the requisite strict scrutiny. The Commonwealth has not demonstrated that the scheme is necessary to promote a compelling state interest, or that it is narrowly tailored to accomplish its stated goal. Accordingly, we hold that Pennsylvania's two-tier durational residency requirement for welfare benefits is unconstitutional as it is based solely on a citizen's length of residing in the state; the scheme impermissibly penalizes citizens who have exercised their fundamental right to travel and migrate interstate, and thus violates the Equal Protection Clause of the Fourteenth Amendment.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWIN MALDONADO, and MARIA DELORES MALDONADO, individually and as next friends of Ana Maldonado, Pablo Maldonado, Edwin Maldonado, Rey Maldonado, Yesenia Maldonado, and Jose Maldonado, and on behalf of all others similarly situated; KENSINGTON WELFARE RIGHTS UNION and PHILADELPHIA WELFARE RIGHTS ORGANIZATION, on behalf of themselves and their members; and TRAVELER'S AID SOCIETY OF PHILADELPHIA, individually and on behalf of its clients,	:	CIVIL ACTION
Plaintiffs,	:	
v.	:	
FEATHER O. HOUSTOUN, Secretary of the PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE, and DON JOSE STOVALL, Executive Director of the PHILADELPHIA BOARD OF ASSISTANCE, both in their official capacities,	:	
Defendants.	:	NO. 97-4155

NEWCOMER, J. October 6, 1997.

MEMORANDUM

Presently pending before this Court are plaintiffs' Motion for Class Certification, defendants' response thereto, and plaintiffs' reply thereto. For the following reasons, this Court grants plaintiffs' Motion.

Also before this Court are plaintiffs' Motion for a Preliminary Injunction, and defendants' response thereto, and plaintiffs' reply thereto. A hearing was held on July 29, 1997, during which the parties offered evidence by way of oral and written testimony. For the following reasons, this Court grants plaintiffs' Motion.

I. Introduction

Plaintiffs--Edwin and Maria Delores Maldonado, individually and next as friends of their children and on behalf of all others similarly situated, and a group of associations that represent their interests[1] — have brought this action to challenge

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[1]These associations are the Kensington Welfare Rights Union ("KWRU"), on behalf of themselves and their members, Philadelphia Welfare Rights Organization ("PWRO"), on behalf of themselves and their members, and Traveler's Aid Society of Philadelphia ("TASP"), individually and on behalf of its clients. These plaintiffs do not purport to represent any persons on a class-wide basis. KWRU is an unincorporated association of low-income people dedicated to ending poverty and homelessness. The members of KWRU are primarily single women who have received public assistance to provide their children with basic necessities. Some of KWRU's efforts are directed toward assisting families who recently moved to Pennsylvania, in some cases from Puerto Rico, to establish themselves in the community. KWRU claims that operation of the multi-tier durational residency will hurt KWRU's members depriving them of assistance necessary to provide for shelter, utilities, food, and other basic

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the constitutionality of the "multi-tier" durational residency requirement contained in Section 9(5)(ii) of Act 35, codified at 62 P.S. § 432(5)(ii). Plaintiffs seek declaratory and injunctive relief on behalf of themselves and the class they represent, asserting that the multi-tier durational residency requirement in Section 9(5)(ii) of Act 35, on its face and as applied by the Pennsylvania Department of Public Welfare ("DPW") and the Philadelphia County Board of Assistance, is unreasonable and

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[1](...continued)
necessities.

PWRO is an unincorporated association of low-income people. Many of PWRO's members have lived outside the Commonwealth of Pennsylvania for some periods of their lives. Because of the challenged law, PWRO claims that its members who arrived or returned here within the last year will be expected to live on wholly inadequate amount of assistance to provide for the basic necessities of life. PWRO contends that not only will the residency requirement result in direct harm to PWRO's membership, but it will sap resources from the organization's other efforts to reform the welfare system and help low-income people address their families' needs.

Plaintiff TASP is a non-profit corporation and the largest social service agency in the Commonwealth serving the needs of poor people migrating to this area, as well as those intending to leave Pennsylvania. TASP is the primary service provider to Philadelphia residents who have recently arrived in Philadelphia, including people who previously lived in the city but have been absent for six months or more, including financial assistance, to assist its clients in integrating into the local area or, where appropriate, to travel to where they have better access to resources. TASP contends that operation of the multi-tier durational residency requirement will strain TASP's resources, will impair the organization's ability to serve its clients, and will also injure its clients directly by depriving them of assistance they need to obtain food, shelter, and other basic necessities of life.

arbitrary, serves no legitimate government purpose, impermissibly penalizes, restricts, reduces, and/or limits plaintiffs' and class members' constitutional rights to travel and to equal protections and non-discriminatory treatment, and violates 42 U.S.C. § 1983.

The defendants in this case are Feather O. Houstoun, the Secretary of the DPW, and Don Jose Stovall, the Executive Director of the Philadelphia County Board of Assistance. The DPW is the executive agency of the Commonwealth vested with responsibility for implementation of the multi-tier durational residency requirement. Stovall is purportedly charged with implementing the multi-tier durational residency requirement in Philadelphia as part of his duties to oversee DPW's cash assistance, food stamp, and medical assistance operations in Philadelphia. Both of these defendants are sued in their official capacities.

This entire action specifically arises out of defendants' implementation and enforcement of Section 9(5)(ii) of Act 35. Section 9(5)(ii) provides:

> Cash assistance for applicants and recipients of aid to families with dependent children who have resided in this Commonwealth for less than twelve months shall not exceed the lesser of the maximum assistance payment that would have been received from the applicant's or recipient's state of prior residence or the maximum assistance payment available to the applicant or recipient in this Commonwealth.

Act 35 (1996), § 9(5)(ii), codified at 62 P.S. § 432(5)(ii).[2]

In operation, this provision of Act 35 creates a multi-tier durational residency requirement--referred to as such because the law in effect creates a multitude of benefit levels for otherwise equally situated families. Under the operation of this statute, families who have been residents of Pennsylvania for more than one year receive all of the benefits they would be eligible for under the state plan. Families who have resided in Pennsylvania for less than one year are limited to the amount of cash assistance that they would have received had they remained in their previous state of residence. This means that if a family has moved to Pennsylvania from a state where they would receive cash assistance of only $300 per month, for the first year of their residence in Pennsylvania they can receive no more than $300 monthly in cash benefits, even if they would otherwise be eligible for hundreds more a month under the normal operation

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[2]Act 35 was signed into law on May 16, 1996 when Governor Tom Ridge signed Senate Bill 1441. Although Act 35 was signed into law in May 1996, Section 9(5)(ii) of Act 35 was not implemented until March 1, 1997, when the DPW published a Notice of Rule Change in the Pennsylvania Bulletin to announce its implementation, effective the next business on March 3, 1997. Section 9(5)(ii) was not the only provision of Act 35 which limited the amount of welfare benefits that new residents of Pennsylvania could receive. Indeed, 62 P.S. § 432.4 imposed a one-year waiting period on the receipt of General Assistance cash benefits and 62 P.S. § 442.1(a)(1) denied Medical Assistance to bona fide residents who have lived in Pennsylvania for less than 90 days. These two provisions have never been enforced in Pennsylvania because the Attorney General of Pennsylvania issued a formal opinion directing the DPW not to enforce them, finding that both provisions were unconstitutional under existing Supreme Court precedent. The Attorney General never issued an opinion with respect to Section 9(5)(ii) because it had not been implemented at the time he issued his opinion.

of the Commonwealth's welfare program. The multi-tiers arise because long-term residents of Pennsylvania--those with at least one year of residence--will receive a certain amount of benefits under Pennsylvania law; whereas, the short-term residents--those persons with less than one year of residency--will receive varying amounts depending on the law of their prior state of residence.

Section 9(5)(ii) is not a lone star in a galaxy of welfare legislation. Indeed, other states have enacted similar provisions. For example, California has enacted a provision which is strikingly similar to Pennsylvania's version.[3] Further, § 604(c) of The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"),[4] 42 U.S.C.

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[3]The California statute provides:

> Notwithstanding the maximum aid payments ...' families that have resided in this state for less than 12 months shall be paid an amount ... not to exceed the maximum aid payment that would have been received by that family from the state of prior residence.

Cal. Welf. & Inst.Code § 11450.03. It should be noted, however, that this statute was found to be unconstitutional. *Roe v. Anderson*, 966 F.Supp. 977 (E.D.Cal.1997) (enjoining enforcement of California's welfare statute).

[4]As most persons are aware, the winds of change have swept over the welfare laws of our country over the past few years. For a number of reasons--which are legally-, politically-, socially-, economically-, morally-, and philosophically-based, the federal and state governments have embarked on a wide-scale reformation of this nation's welfare system. In this regard, the federal government, as well as most of the state governments, have recently enacted radical

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changes to the welfare laws that had been in place for decades.

Prior to 1996, there existed a program called Aid to Families with Dependent Children ("AFDC"), which was established as part of the Social Security Act of 1935. The AFDC developed as "an optional monetary supplement to individual state plans." Todd Zubler, *The Right to Migrate and Welfare Reform: Time for Shapiro v. Thompson to Take a Hike*, 31 VAL. U.L. REV. 893, 926 (1997). Under the AFDC, "the federal government allowed states to retain a one year waiting period for newcomers. The federal government also agreed to pay two-thirds of the program costs to encourage legislatures to increase benefits. This idea was that the more generous a state was with its own money, the more federal dollars that state would get." *Id.* Over the decades, the AFDC grew into a program that provided over $22 billion in benefits in 1993. Id. Although AFDC's expenditures grew over time, "the average real monthly benefit did not." *Id.* The federal government, in recent years, paid approximately fifty-five percent of the AFDC benefits. *Id.* However, the percentage varied from state-to-state. For example, the federal government provided seventy-eight percent of Mississippi's AFDC payments in 1995 as compared to only fifty percent of New York's AFDC payments. Despite this injection of federal money, there existed great disparities in the amount of AFDC benefits paid in states.

For varying reasons, which are plainly beyond the scope of this opinion, Congress repealed the AFDC in 1996 when it enacted the PRWORA. This legislation abolishes the AFDC entitlement program and replaces it with block grants to the states. "Under the Temporary Assistance for Needy Families ("TANF") program, the federal contribution to a state's "family assistance program" is essentially fixed until 2002 at the level of the federal government's 1994 AFDC contribution to the state." *Id.* (citing 42 U.S.C.A. § 603(a)(1)). The states have to maintain their "overall welfare expenditures" at 80% or more of their 1994 levels. 42 U.S.C.A. § 609(a)(7). This legislation also requires states to encourage their recipients to work. Further,
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§§ 601, *et seq*., specifically authorizes states to treat interstate immigrants for one year under the welfare rules (including benefit amounts) of the states from which they moved.[5] Thus, plaintiffs, here, do not seek to enjoin a statute which is an anomaly in the current reformation process but rather plaintiffs seek to enjoin and have declared unconstitutional a statute which many states and the national government believe is central to their current reform efforts.

In this case, the named plaintiffs, Edwin Maldonado, his wife and six children, contend that the operation, implementation and enforcement of Section 9(5)(ii) unconstitutionally discriminates against them because it deprives them of welfare benefits that similarly situated residents of Pennsylvania would receive if they were in the Maldonados' position. In May 1997, the Maldonados moved to Pennsylvania from Guayama, Puerto Rico. The stated reason the family moved to Philadelphia was to

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[4](...continued)
PRWORA limits all welfare recipients to only five years assistance for life, and requires states to have fifty percent of the welfare recipients either working or participating in some type of "work activity" by the year 2002. Zubler, *supra*, at 927 (citations omitted). In essence, these changes in the national welfare laws, including the one year waiting period, are designed to give the states great latitude in deciding how to reform their welfare programs; the idea being that states, under a decentralized system, will be able to improve the welfare system by experimenting with different programs on the state and local level.

[5]42 U.S.C.A. § 604(c) (Supp.1997) provides:
A State operating a program funded under this part may apply to a family the rules (including benefit amounts) of the program funded under this part of another State if the family has moved to the State from the other State and has resided in the State for less than under 12 months.

receive medical care that would have not been available to them in Puerto Rico. Within seven days of arriving in Philadelphia, the Maldonados applied for welfare benefits.

Because of the operation of Section 9(5)(ii), the Maldonados receive only $304 per month in TANF benefits rather than the $836 per month that similarly situated families who have lived in Pennsylvania for the past twelve months receive. The difference represents a monthly loss of $532 per month, or 64 percent. Plaintiffs contend that Section 9(5)(ii) deprives them of basic subsistence-level payments because they cannot afford such basic necessities such as shelter, winter heat, clothing, and food on only $304 per month. Moreover, because Mr. and Mrs. Maldonado cannot currently work, they have no way to generate income.[6] The plaintiffs maintain that they cannot afford such basic necessities even though they receive other welfare benefits from Pennsylvania.

For example, the Maldonados receive approximately $720 worth of food stamps per month.[7] The Maldonados also receive medical benefits through the Keystone-Mercy HMO, for which the Commonwealth is being charged $1483.60 per month. The Maldonados also received two special allowances totaling

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[6]The Commonwealth has determined that Mr. Maldonado is presently disabled and thus entitled to these benefits. In addition, the Commonwealth has determined that Mrs. Maldonado cannot work until she undergoes and recovers from eye surgery that needs to be done so she can work.

[7]In addition, the Maldonados received $955 worth of food stamps for the initial benefit period of May 22 through June 30.

$213, which could be used for Mrs. Maldonado's clothing for job interviews and transportation to prospective employers--interviews which the Commonwealth has determined should not occur until she undergoes and recovers from the eye surgery she needs to be employable. Because Mrs. Maldonado could not work, the Maldonados returned these allowances.

Despite these other benefits, the Maldonados contend that they will be unable to provide for life's basic necessities without a higher monthly cash assistance grant. Indeed, the Maldonados' monthly rent of $350 exceeds their monthly cash assistance, and they do not receive housing assistance. Further, the Maldonados have to pay for utilities such as gas, electricity and the phone. Once again, the Maldonados do not receive assistance for their utilities. The Maldonados also have to provide clothing for themselves and their six children, a cost which is only exacerbated by the fact that they came to Philadelphia from Puerto Rico where there was no need for winter clothing and now they must purchase it. In light of these observations, it is clear that the Maldonados face significant hardship in Pennsylvania due to the fact that they only receive $304 per month.

The Maldonados claim that the disparate treatment they receive by the operation of Section 9(5)(ii) is unconstitutional for three reasons. First, plaintiffs claim that the multi-tier durational residency requirement discriminates against new residents in violation of their fundamental right to travel. Plaintiffs contend that their fundamental right to interstate travel is implicated in this case because (1) Section 9(5)(ii) was enacted in part to deter interstate migration, (2) Section 9(5)(ii) actually deters interstate migration and (3) Section 9(5)(ii) penalizes the right to interstate migration. Because the right to interstate travel is implicated by Section 9(5)(ii), plaintiffs contend that Section 9(5)(ii) is subject

to strict scrutiny. As such, plaintiffs argue that Section 9(5)(ii) is unconstitutional because it was enacted for an impermissible purpose and it is not narrowly tailored to serve a compelling government purpose.

Second, plaintiffs claim that Section 9(5)(ii) is unconstitutional because it violates the Equal Protection Clause. Plaintiffs argue that even under the rational review test, Section 9(5)(ii) must fail because no permissible rational purpose supports the distinctions created by the scheme between new residents and longer-term residents, or the distinctions among new residents who moved to Pennsylvania from different states with varied lower benefit levels. As such, the statute violates the Equal Protection Clause.

Finally, plaintiffs contend that Section 9(5)(ii) violates the Privileges and Immunities Clauses of Article IV and the Fourteenth Amendment because it unjustifiably discriminates against new bona fide residents by treating them as Tennesseans of Kentuckians or other out-of-staters, rather than as citizens of Pennsylvania and the United States.

At this stage of the litigation, plaintiffs move the Court to preliminarily enjoin the enforcement of Section 9(5)(ii) and any and all policies, rules and regulations promulgated by defendants to implement Act 35's multi-tier durational residency requirement. The plaintiffs claim that they are entitled to such relief because it is clear that there is a likelihood of success on the merits, they will be subject to irreparable harm in the absence of such an injunction, defendants will not be subject to irreparable harm if an injunction is granted, and the public interest will be furthered if an injunction is granted.

Plaintiffs also move this Court pursuant to Fed.R.Civ.P.

23(c) and Local Rule 23.1(c) for an Order certifying that this lawsuit may be maintained as a class action with the class defined as:

> All present and future AFDC or TANF applicants and recipients who have applied or will apply for AFDC or TANF since implementation of the multi-tier durational residency requirement began, and who have been, are being, or will be denied the Pennsylvania AFDC or TANF benefits they would receive if they had resided in Pennsylvania for at least twelve consecutive months immediately preceding their application for aid.

The Maldonados further move that they be certified as representatives of the class, and that their attorneys be appointed by the Court as class counsel. Plaintiffs argue that they satisfy the threshold requirements of Rule 23(a) and the class requirement of Rule 23(b)(2).[8]

In opposition to plaintiffs, the defendants argue that plaintiffs are not entitled to either a preliminary injunction or class certification. With respect to the preliminary injunction, defendants argue that plaintiffs cannot demonstrate a likelihood of success on the merits, that plaintiffs will not be irreparably harmed, that the Commonwealth will be irreparably harmed, and that the public interest is furthered by this multi-tier durational residency requirement. With respect to the class certification

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[8]Although plaintiffs contend in their Complaint that they also can satisfy the requirements of a Rule 23(b)(3) class, they only argue for certification of a 23(b)(2) class in their motion. Thus, the Court will only consider certification under Rule 23(b)(2).

motion, defendants argue that plaintiffs cannot satisfy the commonality, typicality and adequacy of representation requirements of Rule 23(a). Defendants also generally argue that a class should not be certified in this case because "it will not lead to efficiencies."

The Court will first consider plaintiffs' motion for class certification and then plaintiffs' motion for a preliminary injunction.

II. Class Certification

Federal Rule of Civil Procedure 23(c)(1) provides that class certification shall be determined "as soon as practicable after the commencement" of the action. Fed.R.Civ.P. 23(c)(1). A determination of class certification does not focus on whether plaintiffs have stated a cause of action or will prevail on the merits but rather is limited exclusively to whether the requirements of Rule 23 have been satisfied. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974); *Wetzel v. Liberty Mutual Ins. Co.*, 508 F.2d 239, 252 (3d Cir.1975); *Sala v. National R.R. Passenger Corp.*, 120 F.R.D. 494, 495 (E.D.Pa.1988). This determination is vested in the sound discretion of the trial court. *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981); *Jenkins v.. Raymark Indus., Inc.*, 782 F.2d 468, 471-72 (5th Cir.1986). Since the court may amend an order granting class certification, *In re School Asbestos Litigation*, 789 F.2d 996, 1011 (3d Cir.1986), in a close case the court should rule in favor of class certification. *Kahan v. Rosenstiel*, 424 F.2d 161, 169 (3d Cir.1970).

To obtain class action certification, plaintiffs must establish that all four requisites of Rule 23(a) and at least one part of Rule 23(b) are met. *Wetzel*, 508 F.2d 239.

A. Rule 23(a) Requirements

Rule 23(a) provides that:

> One or more members of the class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a)(1)-(4).

The United States Court of Appeals for the Third Circuit has succinctly explained the purposes for which Rule 23(a) was created: "The requirements of Rule 23(a) are meant to assure both that class action treatment is necessary and efficient and that it is fair to the absentees under the particular circumstances." *Baby Neal v. Casey*, 43 F.3d 48, 55 (3d Cir.1994). The numerosity requirement addresses the concern of necessity, and the final three requisites are applied in order to determine "whether the class action can be maintained in a fair and efficient manner." Id.

1. Numerosity

The district court can make a common sense determination whether it would be difficult or inconvenient to join all class members as named parties under the particular circumstances of a case. *See, e .g., Senter v. General Motors Corp.*, 532 F.2d 511, 523 (6th Cir.1976); *Peil v. National*

Semiconductor Corp., 86 F.R.D. 357, 365 (E.D.Pa.1980). The Third Circuit has held that joinder is impracticable even where the class is composed of less than one hundred members. See *Weiss v. York Hosp.*, 745 F.2d 786, 808 (3d Cir.1984).

In this case, the numerosity requirement is clearly satisfied. Indeed, defendants do not contest numerosity. Defendants have admitted, at the TRO hearing, that the proposed class consists of more than two thousand families annually who have migrated or will migrate to Pennsylvania from states that provide lower cash assistance benefits through the TANF program. Records produced by defendants in response to plaintiffs' initial discovery request indicate that, within approximately the first four months of full implementation of the multi-tier durational residency requirement, roughly 730 Pennsylvania families have received lower cash assistance benefits because they moved to Pennsylvania from a state with lower benefits. Because the factual and legal issues relevant to their cases do not vary in any material way, joinder of all of their claims would be both inefficient and impracticable. Thus, the Court finds that the numerosity requirement has been satisfied.

2. Commonality

Before the Court determines whether plaintiffs have satisfied the commonality requirement, the Court must first address whether the standard for commonality has been modified by the Third Circuit's decision in *Georgine v. Amchem Products, Inc.*, 83 F.3d 610 (3d. Cir.), *aff'd*, U.S. Dk. No. 96-270.

In *Georgine*, the Third Circuit recognized that some of its prior cases have "stated a very low threshold for commonality." *Id.* In *Baby Neal*, the Third Circuit stated that "[t]he commonality requirement will be satisfied if the named plaintiffs

share at least one question of fact or law with the grievances of the prospective class." *Baby Neal*, 43 F.3d at 56. And, in *School Asbestos Litigation*, 789 F.2d at 1010, the Third Circuit stated that "the 'threshold of commonality is not high.' " (citation omitted). In *Georgine*, the Third Circuit noted that *Baby Neal* involved a class action for injunctive relief, thus raising fewer individualized questions, *Georgine*, 83 F.3d at 627, and *School Asbestos Litigation* upheld the certification of a national class "on the ground that the case involved only property damages." *Id.* (citation omitted). The Third Circuit, in contrast to these cases, held that "the commonality barrier is higher in a personal injury damages class action, like [*Georgine*], that seeks to resolve all issues, including noncommon issues, of liability and damages." *Id.*

Hedging on this statement, however, the *Georgine* court qualified this standard of commonality by stating that it was not holding that "this class fails the commonality requirement because the test of commonality is subsumed by the predominance requirement, which this class cannot conceivably meet." *Id.* The *Georgine* court explained that it was proceeding "cautiously here because establishing a high threshold for commonality might have repercussions for class actions very different from this case ...." *Id.* It appears from these statements the Third Circuit was being ever so careful not to raise the threshold requirement of commonality in class actions except in the most extraordinary cases, such as *Georgine*.

In this case, the Court will not impose a higher threshold of commonality than the standard that was articulated in *Baby Neal*. Although this class action case possesses its own unique features, it is not *Georgine*. *Georgine* was a "personal injury damages class action," involving a settlement class, that was national in scope, where class members were being asked to

compromise future claims without knowing what those claims might be. None of these factors are implicated by the facts in this case, thus the Court will not impose the higher threshold commonality requirement.

Under the *Baby Neal* standard, plaintiffs easily satisfy the commonality standard because there are many common questions of law and/or fact. Under *Baby Neal*, plaintiffs merely have to demonstrate that there is one common question of law or fact to satisfy the commonality requirement. Plaintiffs, in this case, have alleged the existence of numerous questions of fact and law, including, for example: whether the multi-tier durational residency requirement violates plaintiffs' and proposed class members' fundamental right to travel and migrate interstate; whether it violates their right to equal protection under the Fourteenth Amendment of the United States Constitution; and whether it violates their rights under the Privileges and Immunities Clauses of Article IV and the Fourteenth Amendment. Based on the existence of these common questions, the Court finds that the commonality requirement is satisfied.

3. Typicality

The third requirement, "typicality", focuses upon whether the claims of the class representatives are "typical of the claims ... of the class."[9] The typicality requirement "is intended to

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[9]"The concepts of commonality and typicality are broadly defined and tend to merge." *Baby Neal*, 43 F.3d at 56 (citation omitted). Both requirements attempt to "assure that the action can be practically and efficiently maintained and that the interests of the absentees will be fairly and adequately represented." *Id.* (citing *General Tel. Co. v. Falcon*, 457 U.S. 147, 157 n. 13 (1982)). Despite (continued...)

preclude certification of those cases where the legal theories of the named plaintiffs potentially conflict with those of the absentees by requiring that the common claims are comparably central to the claims of the named plaintiffs as to the claims of the absentees." *Baby Neal*, 43 F.3d at 57. "Typicality entails an inquiry whether 'the named plaintiff's individual circumstances are markedly different or ... the legal theory upon which the claims are based differs from that upon which the claims of other class members will perforce be based." ' *Id.* (quoting *Hassine*, 846 F.2d at 177).

"The inquiry assesses whether the named plaintiffs have incentives that align with those of absent class members so that the absentees' interests will be fairly represented." *Georgine*, 83 F.3d at 631 (citing *Baby Neal*, 43 F.3d at 57). A plaintiff's claims are considered typical where, in light of the facts and law applicable to the case, litigation of the named plaintiff's personal claims can reasonably be expected to advance the interests of absent class members. *Scott v. University of Delaware*, 601 F.2d 76, 84 (3d Cir.1979). Additionally, "factual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory." *Grasty v. Amalgamated Clothing & Textile Workers Union*, 828 F.2d 123, 130 (3d Cir.1987); Herbert B. Newberg & Alba Conte, *1 Newberg on Class Actions*, § 3.15 (3d ed.1992).

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[9](...continued)
this similarity, commonality and typicality serve two distinct functions. " 'Commonality' like 'numerosity' evaluates the sufficiency of the class itself, and 'typicality' like 'adequacy of representation' evaluates the sufficiency of the named plaintiff ...." *Hassine v. Jeffes*, 846 F.2d 169, 177 n. 4 (3d Cir.1988).

In this case, the Court finds that the "typicality" requirement is also satisfied. The Maldonado's constitutional claims are shared by each of the prospective class members. By denying those families who recently have moved to Pennsylvania from states that provide a lower level of cash assistance the full level of benefits that longer-term Pennsylvanians receive, the named plaintiffs and the class members all have identical constitutional claims. Although the facts supporting each class member's claim will not be identical, as they never are, their claims arise out of a similar core of facts: that is, all are indigent bona fide Pennsylvania residents who have recently arrived in or returned to Pennsylvania from another jurisdiction that would have paid lower cash assistance benefits, and all are being denied a portion of subsistence benefits needed to provide for the basic necessities of life for the period of year. Thus, although the factual circumstances of each class member's claims will not be identical, the claims are not so "markedly different" that it can be said that the named plaintiffs' interests will perforce conflict with the interests of those of the class.

Indeed, the Third Circuit has held that "even relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of the legal theories." *Baby Neal*, 43 F.3d at 58 (citing *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir.1983)). In this case, there is a strong similarity between the legal theories being advanced by ***322** the named plaintiffs and the legal theories of the putative class members. Therefore the minor factual differences between each member of the putative class do not preclude a finding of typicality due to the fact that there is, at a minimum, "a strong similarity of legal theories."

Although defendants succeed in demonstrating that there exist some individualized questions which arise from the factual

differences between the putative class members' individual claims, defendants fail to demonstrate that the "legal theories of the named plaintiffs potentially conflict with those of the absentees ...." *See Baby Neal*, 43 F.3d at 57. In other words, the Court concludes that "named plaintiffs have incentives that align with those of absent class members so that the absentees' interests will be fairly represented." *See Georgine*, 83 F.3d at 631 (*citing Baby Neal*, 43 F.3d at 57).

4. Adequacy of Representation

Finally, Rule 23(a)(4) requires that plaintiffs must "fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4). The Third Circuit has consistently relied on two factors:

> (a) the plaintiff's attorney must be qualified, experienced and generally able to conduct the proposed litigation; and (b) the Plaintiff must not have interests antagonistic to those of the class.

Weiss, 745 F.2d at 811 (quoting *Wetzel*, 508 F.2d at 247). In this case, both of these requirements have been satisfied; thus, plaintiffs have satisfied the requirements of adequacy of representation.

First, the attorneys who represent plaintiffs have extensive experience in complex litigation generally and in class actions in particular. There is no doubt that plaintiffs' attorneys are well-qualified to conduct the proposed litigation. Second, the plaintiffs do not have interests antagonistic to those of the class. Defendants argue in their brief that plaintiffs are not adequate representatives of the proposed class because their claims are not typical or common with those of the class. However, as discussed above, these claims are without merit.

Indeed, plaintiffs have already demonstrated the "ability and the incentive to represent the claims of the class vigorously." *See Hassine*, 846 F.2d at 179. Further, as noted above, there is no conflict between the Maldonados' claims and those asserted on behalf of the class. Therefore, the Court finds that plaintiffs have satisfied the adequacy requirement of Rule 23(a).

Having demonstrated that they satisfied the threshold requirements of Rule 23(a), plaintiffs must now establish that their proposed class meets the subsections of Rule 23(b). In this regard, plaintiffs argue that they have satisfied the requirements of Rule 23(b)(2).

B. Rule 23(b)(2)

Rule 23(b)(2) provides that:

> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> * * *
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Fed.R.Civ.P. 23(b)(2). The clear language of Rule 23(b)(2) thus dictates that a case may be maintained as a class action only if (1) the prerequisites of Rule 23(a) are satisfied and (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thus making appropriate final

injunctive relief with respect to the class as a whole. The Third Circuit has stated that the requirements of Rule 23(b)(2) are "almost automatically satisfied in actions primarily seeking injunctive relief." *Baby Neal*, 43 F.3d at 58 (observing that a 23(b)(2) class "serves most frequently as the vehicle for civil rights actions and other institutional reform that receive class action treatment").

By implementing and enforcing the multi-tier durational residency requirement and refusing to cease implementation and enforcement in light of plaintiffs' claims, both defendants ***323** have acted and refused to act on grounds generally applicable to the class. In addition, plaintiffs seek broad declaratory and injunctive relief against the defendants. Thus, this action falls squarely within the requirements of Rule 23(b)(2).

Because plaintiffs have sustained their burden of satisfying the prerequisites of Fed.R.Civ.P. 23(a) and the requirements of Rule 23(b)(2), this action will be certified as a class action. The Court now turns to plaintiffs' request for a preliminary injunction.

III. Preliminary Injunction

In ruling on a motion for a preliminary injunction, the trial court must consider: (1) the likelihood that the plaintiff will prevail on the merits at final hearing; (2) the extent to which the plaintiff is being irreparably harmed by the conduct complained of; (3) the extent to which the defendant will suffer irreparable harm if the preliminary injunction is issued; and (4) the public interest. *Merchant & Evans, Inc. v. Roosevelt Bldg. Products, Co.*, 963 F.2d 628, 632-33 (3d Cir.1992). "The injunction should issue only if the plaintiff produces evidence sufficient to convince the district court that all four factors favor preliminary

relief." *Id.* at 633.

A. Likelihood of Success on the Merits

The Court must begin its analysis by considering the likelihood that plaintiffs will prevail on the merits of their claims. In order to properly reach this determination, however, the Court must first set forth and explain the law that must be applied in this case.

1. The Applicable Law

As an initial matter, the Court notes that there is no constitutional right to public welfare assistance, and therefore a constitutional challenge to classifications created by a state's welfare statute, standing alone, is subject to rational basis review. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). However, in this case, plaintiffs do not assert a constitutional right to TANF benefits; instead, they challenge the statute as violative of their constitutional right to travel,[10] their constitutional rights under the Equal Protection Clause of the Fourteenth Amendment, and their constitutional rights under the Privileges and Immunities Clauses of Article IV and the Fourteenth Amendment. Although each and every one of plaintiffs' counts are based on violations of different provisions of the United States Constitution, all of plaintiffs' claims arise out of the modern "right to travel" jurisprudence; an area of jurisprudence that is unsettled and clearly in need of clarification by the United States Supreme

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[10]The Supreme Court has yet to pinpoint the textual basis for this right. *See Lutz v. City of York*, 899 F.2d 255, 260 (3d Cir.1990) (citing no less than seven different constitutional provisions suggested by various Justices as the source of the right to travel).

Court.[11] However, this Court cannot await a clarifying decision by the Supreme Court but rather this Court must attempt to apply this fractured area of law to the facts of this case.

In a line of cases beginning with *Shapiro*, the Supreme Court has considered whether state durational residency requirements implicated the right to travel and interstate migration to such an extent so as to require the application of the

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[11]Many scholars have criticized the Supreme Court's right to travel jurisprudence, articulating many reasons as to why this area of jurisprudence is highly suspect, and indeed, advancing many cogent reasons as to why *Shapiro v. Thompson*, 394 U.S. 618 (1969), the leading case in this area, should be overruled or at least substantially modified. *See, e.g.*, Thomas R. McCoy, *Recent Equal Protection Decisions-Fundamental Right to Travel or "Newcomers" as a Suspect Class*?, 28 VAND. L. REV. 987 (1975); Zubler, *supra* (citing numerous legal scholars who have argued that the Supreme Court should clarify its "right to travel" jurisprudence). Indeed, some Supreme Court Justices have claimed that *Shapiro* was wrongly decided, most notably the late Justice Harlan in dissent in *Shapiro*. Many scholars criticize the *Shapiro* Court for issuing a decision that was an exercise in judicial policymaking rather than textual interpretation of the Constitution. Further, many scholars claim that the right to travel jurisprudence is unsettled and fractured because the *Shapiro* Court failed to base the right to travel on a specific textual provision of the Constitution. *See, e.g.*, Zubler, *supra*, at 896-98, 910 (citations omitted). This Court would tend to agree with this proposition. The Supreme Court's failure to ground the right to travel in a particular provision of the Constitution has led to an unreasoned application of this doctrine because the lower federal courts must apply this right to travel jurisprudence without fully considering the purposes behind the right to travel within its proper textual context. Being an inferior federal court, however, this Court must attempt to fairly apply this unsettled area of law to facts of the case before it.

compelling state interest test.[12] In *Shapiro*, the Court found unconstitutional provisions denying welfare assistance to residents who had not resided for at least one year within the jurisdiction of the particular state in which the applicant had applied for benefits.[13] The Court found that such provisions discriminate invidiously by "creat[ing] two classes of needy

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[12]It is noted that the Supreme Court, in *Shapiro*, made no distinction between the right to travel and the right to interstate migration, despite the fact that these two rights are not identical. For example, a person may have the right to travel in and through a country; however, this very same person may not have the right to migrate, that is, establish a permanent residence in that country. *See* Zubler, *supra*, at 896. The *Shapiro* Court, as well as many other courts, did not attempt to distinguish between these two separate and distinct rights, nor did the Court attempt to ground these rights in any particular textual provision of the Constitution. Many scholars opine that this failure to distinguish between these rights has resulted in much doctrinal uncertainty in this area of jurisprudence. Nonetheless, because the Supreme Court has treated these rights coextensively, this Court must do the same.

[13]In *Shapiro*, plaintiffs challenged the enforcement of three separate welfare laws. One group of plaintiffs challenged a Connecticut statute that had barred them from receiving AFDC benefits because they had not resided in the state for one year or more. Another group of plaintiffs challenged a Pennsylvania statute that had barred them from receiving AFDC benefits solely because they had not been residents of Pennsylvania for a year prior to their applications. The final group of plaintiffs challenged a District of Columbia Code provision that had precluded them from receiving AFDC benefits because they had not resided in the District of Columbia for one year immediately preceding the filing of their applications. All of the statutes that were eventually found to be unconstitutional in *Shapiro* are strikingly similar to the statute being challenged herein.

resident families indistinguishable from each other expect that one is composed of residents who have resided a year or more, and the second of residents who have resided less than a year, in the jurisdiction." Id. at 627, 89 S.Ct. at 1327. The Court found that "any classification which serves to penalize the exercise of that right [to travel] unless shown to promote a compelling state interest, is unconstitutional." *Id.* at 634, 89 S.Ct. at 1331. The Court could not find any compelling purposes behind the statutes in *Shapiro*.

The Court rejected the justification that such a waiting period would deter migration of poor people into the state; such a justification was directly at odds with the constitutional right of migration. *Id.* at 629, 89 S.Ct. at 1328-29. Nor was it relevant whether those migrating to the state in fact were seeking higher assistance payments or came for other reasons; the Court found that a state had no more a right to deter those from settling in search of greater welfare assistance than it would to deter those seeking better educational opportunities. *Id.* at 631-32, 89 S.Ct. at 1329-30. The Court also rejected any justification of the measure based on past tax contributions; this "reasoning would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection." Such an apportionment of state services would violate equal protections. *Id.* at 632, 89 S.Ct. at 1330. Finally, the Court held that the states' legitimate concern for its fiscal integrity could not justify discrimination against new residents for the "saving of welfare costs cannot justify another invidious classification." *Id.* at 633, 89 S.Ct. at 1330.[14]

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[14]The *Shapiro* Court, after it declared the right to travel "fundamental," took a peculiar turn in its logic when it applied equal protection analysis instead of applying substantive due process (continued...)

[14](...continued)
analysis. Zubler, *supra*, at 896. Indeed, it appears that the next step should have been substantive due process analysis. *Id.* at 897 (citing *Sherbert v. Verner*, 374 U.S. 398 (1963)). In *Sherbert*, the Court had struck down a state unemployment program that denied benefits to workers who would not work on Saturdays. "*Sherbert* was one of the first 'unconstitutional conditions' cases, recognizing that the modern welfare state had more ways to deter the exercise of constitutional rights than just using fines and imprisonment." *Id.* In *Sherbert*, the Court held that "denying benefits to those whose practice their religion by not working on Saturdays would impose 'the same kind of burden upon the free exercise of religion as would a fine imposed' for Saturday worship." *Id.* (citing *Sherbert*, 374 U.S. at 404, 83 S.Ct. at 1794). It was this substantive due process analysis that was manifestly at work in *Shapiro 's* reasoning because the Court cited *Sherbert. Shapiro*, 394 U.S. at 634, 89 S.Ct. at 1331. However, the Court did not cite *Sherbert* for its substantive due process analysis, rather it cited *Sherbert* for its equal protection analysis. *Id.*

The Court probably used equal protection analysis because it realized how difficult it would have been to limit its due process analysis. *See* Zubler, *supra*, at 897-98 (explaining why the deprivation of welfare benefit cases are not the normal "penalty" cases and why courts would have difficulty limiting the reach of substantive due process analysis in any case in which welfare benefits had been modified by the state). Despite the Court's attempt to limit the implications of a substantive due process analysis by instead grounding its reasoning in *Shapiro* upon the Equal Protection Clause, the courts find themselves stuck with the same overbreadth problem under Equal Protection analysis because courts are required to determine whether the classifications that a welfare statute create are a "penalty" on the right to travel. The *Shapiro* Court held that any classification that "touches on the fundamental right of interstate movement" is subject to strict scrutiny. *Shapiro*, 394 U.S. at 638, 89 S.Ct. at 1333. However, almost any "state decision regarding welfare
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The Supreme Court refined the Shapiro analysis in two subsequent decisions. In *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), the Supreme Court invalidated an Arizona provision requiring a year's residence in a county as a condition of receiving nonemergency medical care at county expense. The Court posed the issue as whether the state's classification "penalized" persons who had recently migrated to the state. *Id.* at 256-57, 94 S.Ct. at 1081-82. If there were such a penalty the provision would be unconstitutional unless supported by a compelling state interest. Id. at 262-63, 94 S.Ct. at 1084-85. The Court found that just as the denial of the necessities in life in *Shapiro* operated to penalize recent migrants so did the denial of nonemergency medical care. The Court rejected the state's argument that since some medical services-- emergency services--were provided without waiting, the denial of nonemergency medical services could be distinguished from the complete denial as in *Shapiro. Id.* at 259-61, 94 S.Ct. at 1082-84. Moreover, the Court, once again, rejected the argument that the state's interest in protecting its financial stability was of a sufficiently compelling nature. *Id.* at 263, 94 S.Ct. at 1084-85.

In *Dunn v. Blumstein*, 405 U.S. 330 (1972), the Court,

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[14](...continued)
benefits could 'touch on' the right to migrate and thus trigger strict scrutiny." *Id.* at 900. Thus, under the *Shapiro* Court's penalty analysis, almost any statute which is found to effect interstate migration could be found to be unconstitutional despite the fact that the statute may not actually interfere with this right. As Justice Harlan stated in his dissent in *Shapiro*, the fundamental rights strand of equal protection "creates an exception which threatens to swallow the standard equal protection rule." *Shapiro*, 394 U.S. at 661, 89 S.Ct. at 1345 (Harlan, J., dissenting).

relying on *Shapiro,* invalidated a durational residency provision requiring one-year's residence before a new resident could vote. However, *Dunn* did more than just apply *Shapiro*, it made some important clarifications of the right to migrate jurisprudence. First, the Court broadened *Shapiro* by rejecting any notion that *Shapiro* was limited to cases where there was either an intent to deter migration or actual deterrence. The Court stated that strict scrutiny applies to any classification that serves to penalize that right to travel regardless of legislative intent or actual deterrence.[15] *Id.* at 340-41, 92 S.Ct. at 1002-03. The second clarification in *Dunn* was that Justice Marshall attempted to limit the reach of *Shapiro*. Justice Marshall explained that a durational residency requirement would not penalize one's right to travel where the statute was not applied to that person solely based on that person's recent arrival in that state. *Id.* at 342 & n. 12, 92 S.Ct. at 1003 & n. 12.

In sum, *Shapiro* and its progeny establish that a state law implicates the fundamental right to travel and therefore triggers strict scrutiny: (1) when impeding interstate travel is its primary purpose; (2) when its uses a classification which serves to penalize the right to travel; or (3) where it actually deters such travel. *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 903 (1986) (plurality opinion). Before determining whether there is a likelihood that plaintiffs will succeed on the merits, the Court must further explore the Supreme Court's right to travel

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[15]Some commentators have criticized the Court for separating the idea of penalty from deterrence. *See* Zubler, *supra*, at 901. Indeed, it has been suggested that "if the validity of a classification depends on the importance of lost benefits rather than the classification's deterrent effect, 'what is being protected is not the right to travel, but the right to the withheld benefit.' " *Id.* (citing The Supreme Court--1973 Term--Leading Cases, 88 HARV. L. REV. 43, 117-18 (1974)).

jurisprudence because the Supreme Court has appeared to subtly move away from *Shapiro's* fundamental rights analysis. Indeed, no majority of the Court has used *Shapiro's* strict scrutiny since *Maricopa*,[16] and the Court has moved towards something of a rational review test in right to migrate cases.

The Court first backed off *Shapiro's* holding in *Sosna v. Iowa*, 419 U.S. 393 (1975). In this case, the Court upheld the state's one year residency requirement for petitioners seeking a divorce decree when the petitioner is not a state resident for at least one year. The Court found two factors that distinguished *Sosna* from *Shapiro, Dunn* and *Maricopa*. First, the Court noted that the state's interests in regulating domestic relations and

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[16]In *Soto-Lopez*, only the plurality opinion written by Justice Brennan applied *Shapiro 's* fundamental rights analysis. The other five Justices flatly refused to apply *Shapiro 's* analysis. In their brief, plaintiffs argue that three Justices, in the dissent written by Justice O'Connor, agreed with the utility of *Shapiro*. Justice O'Connor's dissent directly contradicts plaintiffs' position. Although Justice O'Connor recognized that the plurality applied *Shapiro 's* enhanced scrutiny, Justice O'Connor explicitly stated that "heightened scrutiny, either under the 'right to migrate' or the Equal Protection Clause ... is inappropriate" in the case at bar. *Soto-Lopez*, 476 U.S. at 924, 106 S.Ct. at 2332 (O'Connor, J., dissenting). Indeed, Justice O'Connor implicitly attacked *Shapiro 's* penalty analysis when she stated that regardless of the Constitutional provision that is used to attack a statute, "something more than the minimal effect on the right to travel or migrate that exists in this case must be required to trigger heightened scrutiny or the plurality's right to travel analysis will swallow all the traditional deference shown to state economic and social regulation." *Id.* at 925, 106 S.Ct. at 2333. Justice O'Connor seemed to be echoing those same concerns as to the overbreadth of *Shapiro* that Justice Harlan first expressed in his dissent in *Shapiro* nearly thirty years ago.

protecting its divorce decrees from collateral attack was materially greater than the budgetary and recordkeeping interests advanced in prior cases. Second, the Court found that the delay in divorce did not "irretrievably foreclose[ ]" persons from eventually obtaining a divorce. The test the Court applied in this case was an ad hoc balancing test and should probably best be viewed as *sui generis*. Zubler, *supra*, at 905.

After *Sosna*, a more noticeable trend in case law appeared in the case of *Zobel v. Williams*, 457 U.S. 55 (1982). In *Zobel*, the Court invalidated an Alaska statute providing payments from oil revenues to all residents where the size of the payment was determined by years of residency.[17] The Court found that such a measure could not even survive the minimum rationality test. The Court warned that an approach that divided residents by years of residency threatened inequality over a large field, whereby residents would be entitled to government services and benefits based on length of residency. *Id.* at 64, 102 S.Ct. at 2314-15. In this opinion, Chief Justice Burger, writing for the Court, made no mention of penalties and wrote in a footnote that the "right to travel analysis refers to little more than a particular application of equal protection analysis." *Id.* at 60 n. 6, 102 S.Ct. at 2313 n. 6. He further emphasized that "[r]ight to travel cases have examined, in equal protection terms, state distinctions between newcomers and longer term residents." *Id.* This

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[17]In *Zobel*, the statute in question basically provided that each person 18 years old or older receives one dividend unit for each year of residency subsequent to 1959, the first year of statehood. Based on this statute alone, a clear distinction can be noticed between *Zobel* and *Shapiro* and its progeny, that is, *Zobel* was a case that dealt with a fixed residency requirement that treated each year as a different group; whereas, the *Shapiro* cases only dealt with two groups--residents for one year or more and residents for less than one year.

language clearly indicates the Court's desire to shift the analysis in right to migrate cases away from the fundamental right/penalty analysis. Indeed, the Court noted that there was no need to determine whether enhanced scrutiny should apply because the Alaska statute failed the minimal rationality test.

However, the minimum rationality test that was applied by the *Zobel* Court appeared to be an "enhanced" rational basis review. Zubler, *supra*, at 905. Indeed, Professor Lawrence Tribe has argued that the Court's enhanced review appears "more the result of dissatisfaction with existing tools of equal protection analysis for dealing with [discrimination against newcomers] than of any overall shift in the Court's scrutiny of how well various purposes fit legislatively chosen means." *Id.* at 905-906 (citing Lawrence H. Tribe, AMERICAN CONSTITUTIONAL LAW § 16-2 (2d ed.1988)). Thus, the Court appears to have established a different test, in the framework of Equal Protection, to use in deciding right to travel cases. The Court has created a rational basis review that has more punch then the typical rational review test.

This "enhanced" rational basis review was actually applied by the Court again in the case of *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985). In *Hooper*, the state provided a tax exemption for Vietnam Veterans residing in the state prior to May 8, 1976. The Court, applying *Zobel 's* rational review basis, invalidated the preference because it was based on a impermissible purpose--the state's desire to reward its "own" residents based on their "past contributions" to the state. *Id.* at 622-23, 105 S.Ct. at 2868-69. Citing *Zobel*, the Court noted that residents may not be discriminated against solely on the basis of the date of their arrival in the state. Id. at 623, 105 S.Ct. at 2868-69. Thus, *Hooper* continued the Court's trend away from applying enhanced strict scrutiny in right to travel cases.

In 1986, the Supreme Court decided the *Soto-Lopez* case, which only caused more confusion with the right to migrate jurisprudence. In this case, the Supreme Court struck down a civil service employment preference for veterans who had lived in New York when they entered the service.[18] Although the Court had only recently applied the *Zobel* test in *Hooper*, the Court was unable to produce a majority opinion. The plurality opinion, authored by Brennan, used *Shapiro 's* penalty analysis to invoke strict scrutiny to strike down the state's preference program favoring longer-term residents. Chief Justice Burger and Justice White concurred, but only on the grounds that New York's program failed *Zobel's* minimal rationality test. Justice O'Connor, Rehnquist and Stevens disagreed, arguing that New York's program passed equal protection rational basis and that the program's minimal effect on interstate migration was insufficient to invoke the higher scrutiny of the Comity Clause, on which these justices now grounded the right to migrate. Thus, this Court is left with the task of applying this splintered jurisprudence to the facts of this case to determine whether Section 9(5)(ii) passes constitutional muster. However, before the Court applies this law, it must describe Justice O'Connor's

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[18]The statute at issue in *Soto-Lopez* granted a civil service employment preference, in the form of points added to examination scores, to New York residents who were honorably discharged veterans of the United States Armed Forces, who served during time of war, and who were residents of New York when they entered military service. *Soto-Lopez*, thus, is a case where the statute created fixed, permanent distinctions between residents based on when they arrived in the state. Thus, it can be distinguished from the *Shapiro* cases on this ground. *Shapiro* and its progeny are cases that deal with distinctions between all long-term residents and all newcomers; whereas, *Soto-Lopez* was a case that dealt with not only *Shapiro* type distinctions but also distinctions between long-term residents.

Comity Clause test in more detail because the plaintiffs here advance this same Comity Clause[19] argument.

In *Zobel*, Justice O'Connor suggested that the right to migrate should be based in Article IV's "Privileges and Immunities" Clause, and her dissenting opinion in *Soto-Lopez* gained the votes of both then-Justice Rehnquist and Justice Stevens. Justice O'Connor in *Zobel* found that the right to migrate was based in the text of the Comity Clause of Article IV, holding that this provision of "the Constitution supplies the relevant basis for analysis in evaluating claims ..., where the principal allegation is that the state scheme impermissibly distinguishes between state residents, allegedly imposing a relative burden on those who have more recently exercised their right to establish residence in the State." *Soto-Lopez*, 476 U.S. at 920, 106 S.Ct. at 2330 (citing *Zobel*, 457 U.S. at 74-75, 102 S.Ct. at 2320- 21 (O'Connor, J., concurring opinion)). Under this Comity Clause analysis, the constitutionality of a durational residency requirement would depend in part on whether non-citizens "constitute a peculiar source of the evil at which the statute is aimed." *Zobel,* 457 U.S. at 76, 102 S.Ct. at 2321. If the Court did find that the non-citizen constituted the peculiar source of evil, the statute would be found unconstitutional if there was no " 'substantial relationship' between the evil and the discrimination practiced against the noncitizens." *Id.* Thus, Justice O'Connor, through her concurrence in *Zobel* and dissent in *Soto-Lopez*, has added another wrinkle to the Supreme Court's right to migrate jurisprudence, which this Court must attempt to apply to this case.

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[19]The Comity Clause guarantees that the "Citizens of each state shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. Art. IV, § 2.

2. The Law Applied

Whatever the current state of the Supreme Court's right to migrate jurisprudence, the Court must apply the *Shapiro* analysis to the case at bar because it is still binding precedent on this Court due to the fact that it has never been overruled and its facts are similar to this case.

Under *Shapiro* and its progeny, a state law implicates the fundamental right to travel and therefore triggers strict scrutiny: (1) "when impeding [interstate] travel is its primary objective"; (2) "when it actually deters such travel"; or (3) "when its uses any classification which serves to penalize the right to travel." *Soto-Lopez*, 476 U.S. at 903, 106 S.Ct. at 2321 (citations and internal quotations omitted). Plaintiffs argue that strict scrutiny should be applied to review Section 9(5)(ii) because the multi-tier durational residency requirement exhibits all three of these features. Notwithstanding plaintiffs' argument, the Court finds that in light of the record before it, plaintiffs have not established that any of these features are present.

First, plaintiffs have not established that the "primary objective" of Section 9(5)(ii) is to inhibit interstate migration. Defendants argue that Section 9(5)(ii) furthers two governmental objectives: (1) the distinctions created by the multi-tier durational residency requirement will encourage work and self-sufficiency and (2) Section 9(5)(ii) will prevent Pennsylvania from becoming a "welfare magnet," thus ensuring the financial stability of Pennsylvania's welfare program. Plaintiffs surely cannot claim that Pennsylvania's objective to encourage its residents to work and become self-sufficient would support a finding that the primary objective of Section 9(5)(ii) is to inhibit interstate migration. Indeed, the *Shapiro* Court has held that the purported goal of encouraging employment is an "admittedly

permissible state objective []." *Shapiro*, 394 U.S. at 634, 89 S.Ct. at 1331. Thus, in order to support their "primary objective" argument, plaintiffs must look to the other purpose advanced by defendants.

As stated above, defendants candidly admit that Section 9(5)(ii) was enacted to prevent Pennsylvania from becoming a welfare magnet. In general terms, the welfare magnet theory "postulates that poor people are induced to move to states which pay relatively higher welfare benefits because they want to take advantage of those benefits."[20] (Hartman Decl. ¶ 5). When defendants state that Section 9(5)(ii) was enacted to prevent Pennsylvania from becoming a welfare magnet, what defendants are in essence saying is that Pennsylvania enacted Section 9(5)(ii), at least in part, to discourage poor migrants from coming to Pennsylvania to take advantage of its welfare benefits. This finding is necessarily so because the only way Pennsylvania can

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[20]At the preliminary hearing, Professor John Hartman, an Assistant Professor of Sociology at Columbia University, testified that there simply exists no statistical evidence that would support the welfare magnet theory. These findings were based on statistical studies that he and a colleague had conducted over a two-year period. Based on these studies, Professor Hartman reached the conclusions that poor migrants are not more likely to move to states with higher benefits than states with lower welfare benefits; poor migrants are not more likely to receive AFDC than long-term residents; relatively high welfare benefits levels do not hold poor people in place; and relatively high welfare benefits do not encourage the receipt of benefits. Professor Hartman also strongly criticized seven other large scale attempts to measure the magnetic effect of welfare benefits. In his opinion, "each of the studies [are] flawed in some meaningful way, and none of the studies truly test[] the proposition that poor women of childbearing age are likely to move from states that pay low AFDC benefits to states with higher AFDC benefits." (Hartman Decl. ¶ 8)

achieve its goal of not becoming a welfare magnet is if poor migrants do not come to Pennsylvania, that is what Section 9(5)(ii) was intended to do in part.

The Supreme Court has repeatedly stated that a law enacted for the purpose of inhibiting migration into state is virtually unconstitutional. *See Hooper*, 472 U.S. at 620 n. 9, 105 S.Ct. at 2866 n. 9; *Zobel*, 457 U.S. at 62 n. 9, 102 S.Ct. at 2314 n. 9; *Maricopa*, 415 U.S. at 263-64, 94 S.Ct. at 1084- 85; *Shapiro*, 394 U.S. at 629, 89 S.Ct. at 1328-29. Indeed, the Supreme Court has held that "the purpose of inhibiting migration by needy persons into the State is constitutionally impermissible." "If a law has 'no other purpose than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional.' " *Shapiro*, 394 U.S. at 631, 89 S.Ct. at 1329 (citation omitted).

Applying this law, this Court can draw two conclusions about the welfare magnet purpose advanced by the Commonwealth. First, the purpose of preventing the Commonwealth from becoming a welfare magnet is constitutionally impermissible. *See id.* at 629, 89 S.Ct. at 1328-29. The Commonwealth simply cannot attempt to discourage poor persons from migrating to the Commonwealth in order to prevent the state from becoming a welfare magnet; the law is clear on this point. Moreover, the Commonwealth cannot purify this impermissible purpose with the assertion that the money saved by discriminating against newly-arrived TANF recipients will provide Pennsylvania with resources to direct additional assistance to longer-term residents. *Id.* at 633, 89 S.Ct. at 1330-31. Indeed, the Supreme Court has stated that while "a State has a valid interest in preserving the fiscal integrity of its programs," the "State may not accomplish such a purpose by invidious distinctions between classes of its citizens." *Id.* The *Shapiro*

Court concluded by holding that states "must do more than show that denying welfare benefits to new residents saves money. The saving of welfare costs cannot justify an otherwise invidious classification." *Id.* Applying this precedent, it is obvious that Pennsylvania's purpose of preventing it from becoming a welfare magnet is constitutionally impermissible.[21]

The second conclusion that this Court reaches, however, is that strict scrutiny should only be applied if the "primary objective" of Section 9(5)(ii) is to deter migration. *Soto-Lopez*, 476 U.S. at 903, 106 S.Ct. at 2321. Thus, the question posed to this Court is whether the "primary objective" of Section 9(5)(ii) is the impermissible purpose of deterrence or the permissible purpose of encouraging work and self-sufficiency. Plaintiffs, citing Section 9(5)(ii)'s legislative history,[22] official statements

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[21]Although this result may seem counter-intuitive on an economic level, this result is mandated by the Supreme Court's constitutional law.

[22]Plaintiffs first direct this Court's attention to evidence disclosing the Commonwealth's longstanding alleged animus toward impoverished migrants. However, this alleged evidence is irrelevant to this case because it is not the legislative history to Section 9(5)(ii), but rather is the legislative history to prior statutes and even bills that were never enacted into law. With respect to Section 9(5)(ii), plaintiffs quote statements made by two state representatives that allegedly reflect the legislative history of Section 9(5)(ii). One of these statements was made by Representative Charles Dent during debate on the bill that became Act 35. Rep. Dent stated that Pennsylvania will "welcome" only those who come to the Commonwealth "for a life, not for a subsidy[.]" House Leg. J. at 925-96. And Rep. Pat Browne stated that individuals who move to Pennsylvania for benefits are "individuals who are here to cherry-pick and here to shop for our

(continued...)

the DPW has made to the federal government in implementing the multi-tier benefits scheme,[23] and statements made by

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[22](...continued)
benefits." House Leg. J. at 935 (May 15, 1996). These statements are hardly overwhelming evidence that Pennsylvania passed Section 9(5)(ii) with the primary purpose of deterring migration. Indeed, these statements were made by only two state representatives and were made during a debate over Act 35, not specifically Section 9(5)(ii). Based just on these two statements, any court would be hard-pressed to conclude that the legislative intent behind the enactment of Section 9(5)(ii) was to deter migration.

Plaintiffs also rely on statements that were contained in a platform when Governor Ridge was campaigning for the governorship in 1994. However, statements made by a candidate for governor simply cannot be considered legislative history for a statute that was enacted nearly two years later. It is one thing for Governor Ridge's supporters to hold him accountable for the promises he made in his platform for governor; it is an entirely different proposition to raise the promises he made in his platform to legislative history.

[23]The DPW applied to the federal government for a waiver of AFDC requirements that, until the passage of PRWORA, would have precluded enforcement of the multi-tier durational residency requirement. In that application, DPW stated:

> We request a waiver to limit the AFDC grant for applicants and recipients during the first 12 months of residency in this State. The grant shall not exceed the lesser of the maximum assistance received in the prior state or the maximum available in Pennsylvania. Current policy does not require a national payment standard, and the payment amounts vary widely from state to state. *We must ensure that Pennsylvania resources are available to Pennsylvania residents.*

(continued...)

defendants in their briefing, argue that the primary objective of this statute is to deter migration. In contrast, defendants contend that the primary purpose behind the enactment of Section 9(5)(ii) is to encourage work and self-sufficiency. In support of this position, defendants cite to Section 401 of Act 35 which sets forth the legislative intent for the enactment of Act 35: "It is hereby declared to be the legislative intent to promote the self-sufficiency of all the people of the Commonwealth." It is rare that a Court is provided with such a clear statement of the legislative intent behind a statute.

After considering the purposes that Section 9(5)(ii) was enacted for, the Court concludes that plaintiffs cannot establish that the "primary objective" behind the enactment of Section 9(5)(ii) was to deter migration. The snippets of legislative history and the statement from the DPW do not convince this Court that the primary objective behind the enactment of Section 9(5)(ii) was to deter migration in light of the clear legislative intent of Act 35, which is to encourage self-sufficiency and work. While the Court recognizes that one of the purposes behind Section 9(5)(ii) was to discourage an influx of poor migrants into Pennsylvania, the Court simply cannot find that this was Pennsylvania's primary objective in enacting Section 9(5)(ii). Thus, strict scrutiny will not be applied based on the "primary objective" of the statute.

Plaintiffs also fail to prove that Section 9(5)(ii) actually deters migration. The only evidence that plaintiffs offer in support of their actual deterrence argument is not evidence at all but rather a statement made by the *Shapiro* Court. In *Shapiro*, the

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[23](...continued)
Demonstration Project 1115 Waiver Application at IV-10 (emphasis added).

Court held that state laws requiring indigent families to wait a year before receiving subsistence level benefits are "well-suited to discourage the influx of poor families in need of assistance." *Shapiro*, 394 U.S. at 629, 89 S.Ct. at 1328. The plaintiffs here, just like the plaintiffs in *Shapiro*, simply offer no empirical evidence that Section 9(5)(ii) will discourage migration. This Court simply cannot rely on speculation and conjecture in deciding whether a statute is potentially unconstitutional. In addition, the little evidence which has been offered indicates that there is no actual deterrence. Indeed, plaintiffs' own witness, Professor Hartman, concluded that poor migrants do not move based on welfare benefits, *i.e.*, welfare benefits simply are not a consideration when poor migrants decide to move. Thus, the Court finds that plaintiffs cannot establish that Section 9(5)(ii) actually deters migration.[24]

Finally, the Court finds that plaintiffs cannot demonstrate that Section 9(5)(ii)'s durational residency requirement results in a "penalty" on the right to interstate migration. To begin, the Supreme Court has made it clear that not every durational residency requirement rises to the level of a penalty and that the parameters of the *Shapiro* penalty analysis are undefined:

> Although any durational residency requirement impinges to some extent on the right to travel, the Court in *Shapiro* did not declare such a requirement to be *per se* unconstitutional. The

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[24]The Court notes that the *Shapiro* Court merely surmised that the statute in question therein would actually deter migration; its conclusion was not based on empirical evidence. This Court, however, cannot rest its finding on conjecture because the Supreme Court's decisions require this Court to determine if the durational residency requirement actually deters migration.

> Court's holding was conditioned, 394 U.S. at 638 n. 21, 89 S.Ct. at 1333 n. 21, by the caveat that some "waiting period or residence requirements ... may not be penalties upon the exercise of the constitutional right to interstate travel." The amount of impact required to give rise to the compelling-state interest test was not made clear.

Maricopa, 415 U.S. at 256-57, 94 S.Ct. at 1081-82. Thus, the question here is whether the durational residency requirement that limits cash benefits to the level of the state of prior residence but that allows qualified new residents access to food stamps, clothing for job interviews, medical assistance, emergency assistance, and job transportation rises to the level of a *penalty* on the right to interstate migration that would trigger strict scrutiny analysis. *See Warrick v. Houstoun*, Civil Action No. 94-1634, at 16 (W.D.Pa. Aug. 30.1996). This Court concludes that it does not.

Relying on *Shapiro* and its progeny, plaintiffs argue that Section 9(5)(ii) penalizes plaintiffs and class members by limiting TANF benefits to the level of plaintiffs' and the class members' prior state of residence because it deprives them of basic necessities of life. The Court, however, first finds several distinctions between the statutes at issue in *Shapiro* and its progeny and the durational residency requirement at issue here. In *Shapiro*, the statute at question therein deprived the newcomers of all benefits necessary for basic sustenance and health, including food, shelter and medical care, a complete denial that would last for a year. The deprivation in *Shapiro*, thus, clearly imposed a penalty on the newcomers because it essentially deprived them of life's basic necessities.

In this case, the newcomers to Pennsylvania are not being

deprived of the things that are necessary for their very survival, since the plaintiffs and class members are eligible to receive TANF cash assistance benefits, albeit, at a reduced level, food stamps, clothing for job interviews, medical assistance, and job training and transportation, in addition to receiving assistance in finding employment, without regard to any durational residency requirement. Indeed, this case is distinguishable from *Shapiro* because *Shapiro* addressed a statute which caused a complete deprivation of life's basic necessities. For example, the newcomers in *Shapiro* received no cash assistance. In this case, the newcomers receive TANF cash assistance at the same level that they would have received in their state of prior residence. The plaintiffs also receive food stamps ($720 per month) and medical benefits ($1483.60 per month), and are eligible to receive the state's assistance in finding employment. These facts militate against a finding that the multi-tier durational residency requirement imposes a penalty on the plaintiffs' right to interstate migration.

This conclusion is bolstered by the fact that the lower benefits provided do not make new residents any worse off because the new residents receive exactly what they were receiving or would have received in their state of prior residence. Thus, the "penalty" that plaintiffs allege is imposed on them for exercising their right to migrate interstate is not a "penalty" in the traditional sense of the word--a lost benefit that the person would have received had he not exercised some constitutional right. Zubler, *supra*, at 897. Indeed, the plaintiffs here have lost no benefit that they would have received had they not exercised their right to migrate.[25] Thus, given the fact that new migrants

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[25]This entire discussion with respect to whether or not the Maldonados were penalized for exercising their right to migrate (continued...)

are provided the means of obtaining what is necessary for their basic sustenance and health, combined with the fact that the Supreme Court has subtly moved away from applying the penalty analysis in cases where there has been no penalty in the traditional sense, the Court finds that Section 9(5)(ii)'s multi-tier durational residency does not act as a penalty on plaintiffs' right to interstate migration.

Because the durational residency requirement of Section 9(5)(ii) dose not operate as a penalty on an individual's right to interstate migration, strict scrutiny is not appropriate. Thus, Section 9(5)(ii) need only be rationally related to a legitimate government purpose to survive the constitutional challenge mounted in the present case.

As stated above, the Commonwealth offers as its legitimate government objectives: (1) "discouraging persons from shopping around for the 'best benefit package of the year' " (2) an intent to encourage employment, self- respect and self-dependency among its welfare recipients, that is to encourage self-reliance over reliance on welfare. The first purpose, of course, is an unconstitutionally impermissible purpose. *See Shapiro*, 394 U.S. at 629, 89 S.Ct. at 1328-29. The Supreme Court has explicitly stated that "the purpose of inhibiting

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[25](...continued)
highlights the difficulty that courts have in applying the *Shapiro* Court's penalty analysis to a case where there is not a penalty in the traditional sense of the word. In fact, the "penalty" that is allegedly imposed in these cases is a mere legal fiction. Indeed, in the Court's more recent cases, the Court appears to have tended to subtly shift the analysis away from the penalty aspect of *Shapiro* because of the inherent difficulty in applying this analysis in cases where there exists no penalty in the traditional sense.

migration by needy persons into the State is constitutionally impermissible." *Id.* The defendants admit that Section 9(5)(ii) was enacted in part to discourage welfare recipients from shopping around for benefits and to prevent an "influx of indigent people from other states." Because the first purpose is not valid, the Court must turn to the second purpose offered in support of Section 9(5)(ii). This purpose, unlike the first purpose, is clearly a legitimate government objective. The Supreme Court has stated that encouraging work is an "admittedly permissible state objective[]." *Id.* at 634, 89 S.Ct. at 1331. Thus, the next question to be answered is whether Section 9(5)(ii) is rationally related to a legitimate government purpose.

Although the Supreme Court has stated that encouraging employment is a legitimate government purpose, the Court has also expressly held that a one-year waiting period that is justified as a means of encouraging new residents to seek and obtain employment sooner "provides *no rational basis* for imposing a one-year waiting period restriction on new residents only." *Id.* at 637-38, 89 S.Ct. at 1333. Thus, under binding Supreme Court precedent, Section 9(5)(ii)'s one year waiting period simply cannot be justified by claiming that it encourages newcomers to work because it simply is not rationally related to this purpose. Indeed, a close review of how Section 9(5)(ii) would operate indicates that Section 9(5)(ii) must fail because of its inherent irrationality.

To begin, if the goal of the multi-tier durational residency requirement is to promote self--sufficiency, for example by encouraging work, "this logic would also require a similar waiting period for long-term residents of this State." *Id.* at 637, 89 S.Ct. at 1333. In addition, defendants' justification depends on the wholly unsubstantiated assumptions that newcomers to Pennsylvania are somehow less motivated than more established

TANF recipients to seek work and that, when they apply for cash assistance, the members of the latter group but not the former have exhausted any alternatives the Commonwealth has to offer.

Moreover, the complete irrationality of Section 9(5)(ii) is exposed when the Court compares the amount of benefits that similarly situated groups of newcomers will receive. The Commonwealth has enacted Section 9(5)(ii) for the purpose of encouraging work; the assumption being that if the newcomers receive less money, then they will have a greater incentive to join the work force. Thus, one would expect that Section 9(5)(ii), in operation, would limit the benefits that all newcomers receive because the purpose is to encourage all newcomers to work. Section 9(5)(ii), however, fails miserably to achieve this purpose.

Indeed, Section (5)(ii) and its rules and regulations provide for multiple benefit levels for identically situated newcomers. For example, if you had two families, identically situated, arriving in Pennsylvania on the same day, establishing a residence in Pennsylvania and then applying for TANF benefits, but one of the families was from California and one was from Puerto Rico, the family from California[26] would receive the same benefits that a long-term family would receive, and the family from Puerto Rico would receive the limited benefits. At the present time, approximately twenty states have welfare benefits higher then Pennsylvania's benefits; newcomers that come from any of these twenty states would automatically receive the full amount of Pennsylvania TANF cash assistance.

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[26]Because California provides more generous benefits to TANF recipients than Pennsylvania does, those people who move from California to Pennsylvania and apply for benefits in Pennsylvania receive the same amount that longer-term Pennsylvania residents receive. 62 P.S. § 432(5)(ii).

In addition, but more surprisingly, the residency requirement appears not to apply to poor migrants from other countries. Hence, new state residents from one of the United States that pays lower benefits will receive less cash assistance than new residents from foreign countries. From these observations, it is manifest that Section 9(5)(ii) is anything but rationally related to achieving its purpose of encouraging newcomers to work. Indeed, large groups of newcomers would automatically receive full benefits upon first arriving in Pennsylvania. This result underscores the irrationality of Section 9(5)(ii).

Because plaintiffs cannot demonstrate that Section 9(5)(ii) is rationally related to its espoused governmental purpose, it appears that Section 9(5)(ii) violates the Equal Protection Clause of the Fourteenth Amendment. Thus, plaintiffs have established a likelihood of success on the merits.[27]

B. Irreparable Harm to Plaintiffs

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[27]With respect to plaintiffs' Privileges and Immunities Clause argument, the Court finds that plaintiffs would be hard-pressed to establish a violation of this constitutional provision. First, Justice O'Connor's Comity Clause argument has never been adopted by a majority of the Court. Indeed, the majority opinion in *Zobel* did not support the position advanced by Justice O'Connor. Second, and more importantly, Justice O'Connor's argument cannot find support in Article IV's Comity Clause. As stated by then-Justice Rehnquist, this "Clause assures nonresidents of a State shall enjoy the same privileges and immunities as residents enjoy.... We long ago held that the Clause has no application to a citizen of the State whose laws are complained of." *Zobel*, 457 U.S. at 84 n. 3, 102 S.Ct. at 2325 n. 3 (citations omitted) (Rehnquist, J., dissenting). Thus, in this case, when the Maldonados became citizens of Pennsylvania, they lost the protection that the Comity Clause of Article IV affords.

As this Court held in its Order dated June 25, 1997, in which the Court denied plaintiffs' request for a temporary restraining order, the plaintiffs have demonstrated that they will suffer irreparable harm in the absence of a preliminary injunction. Plaintiffs can demonstrate irreparable harm based on the sole fact that they will be deprived of their constitutional right to the equal protection of law in the absence of an injunction. *Olmeda v. Schneider*, 889 F.Supp. 228, 231-32 (D.V.I.1995).

In addition to the deprivation of their right to equal protections, plaintiffs will be irreparably harmed due to the loss of much of their cash assistance benefits. In *Caulk v. Beal*, 447 F.Supp. 44 (E.D.Pa.1977) (Newcomer, J.), this Court recognized the enormity of the harm that the loss of cash assistance benefits visits on low-income persons. Other courts have also recognized that a reduction in subsistence benefits constitutes irreparable harm to persons on the "margin of subsistence." *Philadelphia Welfare Rights Org. v. O'Bannon*, 525 F.Supp. 1055, 1058-60 (E.D.Pa.1981); *see also Hill v. O'Bannon*, 554 F.Supp. 190 (E.D.Pa.1982). In *PWRO v. O'Bannon*, the court held that the plaintiffs would face irreparable harm if they lost food stamps benefits averaging two or three dollars per month. In addition, in *Mayhew v. Cohen*, 604 F.Supp. 850 (E.D.Pa.1984), the court found that irreparable and substantial harm existed when poor families were deprived of 10 percent of their welfare checks. *Id.* at 859.

In this case, even if the Maldonados were to receive the full TANF benefits, they would be living at only 37 percent of the poverty line according to official poverty guidelines

published by the Department of Health and Human Services.[28] A reduction of their TANF benefits, due to the operation of Section 9(5)(ii), constitutes irreparable harm because they already live on the margin of subsistence. Although the Maldonados as yet have not been pushed into homelessness or rendered unable to feed themselves or their children, Edwin Maldonado testified that he had not yet received his utility bills for which he will receive no assistance in paying. Adding these bills to their monthly rent, and the fact that Mr. Maldonado still has to buy winter clothing for his six children, it becomes clear that the Maldonados will be unable to pay for the basic necessities of life due to the operation of Section 9(5)(ii). Moreover, Edwin and Maria Maldonado are both presently unable to work according to the Commonwealth's own determinations, thus the Maldonados will be unable to earn money to make up for the obvious shortfall in income. Under these circumstances, it is clear that the Maldonados will suffer irreparable harm in the absence of a injunction.

C. Irreparable Harm to Defendants

The only argument defendants make to support their contention that a preliminary injunction will irreparably harm the Commonwealth is a fiscal one. They allege that if an injunction is granted but the Commonwealth ultimately prevails, it is highly unlikely that the Commonwealth will be able to recover its overpayment of cash assistance. But the Commonwealth's desire to save money is not a legitimate basis for discriminating against newly-arrived residents in the distribution of welfare benefits. *See Shapiro*, 394 U.S. at 633, 89 S.Ct. at 1330-31. Accordingly, the Commonwealth cannot claim a legally cognizable injury.

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[28] *See* Annual Update of the HHS Poverty Guidelines, 62 Fed.Reg. 10856 (Mar. 10, 1997).

In addition, defendants do not discuss why the Commonwealth could not recover overpayment through future grant reductions or through other debt collection processes. *See, e.g., Turner v. McMahon,* 830 F.2d 1003 (9th Cir.1987) (upholding federal statute permitting recoupment of funds expended pursuant to a preliminary injunction), *cert. denied*, 488 U.S. 818 (1988). Based on these reasons, the Court finds that defendants have failed to establish that they will experience irreparable harm if the injunction is granted.

D. The Public Interest

First, it is clearly in the public interest to ensure that all bona fide Pennsylvania residents receive temporary assistance when they are unable to adequately provide for their families and themselves. Second, it is also in the public interest to ensure that Pennsylvanians are not driven into the streets or forced to go without food, shelter or heat due to an unconstitutional statute.

Finally, the defendants have failed to point to any countervailing public interest that would counsel against granting the requested injunctive relief. Indeed, defendants cannot plausibly argue that the multi-tier durational residency requirement advances the public interest because it violates the Equal Protection Clause of the United States Constitution as articulated by the Supreme Court's right to migrate jurisprudence. With this said, the Court finds that the public interest will be furthered by the granting of the preliminary injunction requested herein.

IV. Conclusion

Accordingly, for the foregoing reasons, the Court will grant plaintiffs' motion for class certification. The Court will

also grant plaintiffs' motion for a preliminary injunction, it appearing that plaintiffs have a reasonable probability of eventual success on the merits, plaintiffs will sustain immediate and irreparable injury unless a preliminary injunction is issued, greater injury would result by refusing the injunction than by granting such relief, and the public interest would be promoted by the grant of preliminary relief.

Although the Court determines that Section 9(5)(ii) of Act 35 fails to pass constitutional muster under binding Supreme Court precedent, today's decision should not be taken to mean, in any fashion, that the actions of legislature of the Commonwealth of Pennsylvania were undertaken for nefarious purposes. Under our Nation's current welfare laws--which are highly decentralized in the hope that experimentation at the state level will lead to an improvement in these laws, and thus free an untold number of people from their dependency on welfare, durational residency requirements may be needed, and indeed even required, to prevent what has been called the race to the bottom. Without these durational residency requirements, the only option left to a well- intentioned legislature, if it believes that the welfare magnet is correct, is to lower benefits. Thus, the Commonwealth's decision to enact Section 9(5)(ii) cannot be found to have been unreasonable or ill-intentioned, indeed, this Court finds to the contrary. Instead, Section 9(5)(ii) is unconstitutional under binding Supreme Court precedent because it fails to rationally advance the legitimate governmental purposes that underlie it.

AND IT IS SO ORDERED.

ORDER

AND NOW, this 6th day of October, 1997, upon

consideration of Plaintiffs' Motion for Class Certification, and defendants' response thereto, and plaintiffs' reply thereto, it is hereby ORDERED that:

1. The Motion for Class Certification is GRANTED and the following class is CERTIFIED pursuant to Fed.R.Civ.P. 23(b)(2) & (c):

All present and future AFDC or TANF applicants and recipients who have applied or will apply for AFDC or TANF since implementation of the multi-tier durational residency requirement began, and who have been, are being, or will be denied the Pennsylvania AFDC or TANF benefits they would receive if they had resided in Pennsylvania for at least twelve consecutive months immediately preceding their application for aid.

2. Plaintiffs Edwin and Maria Delores Maldonado individually and on behalf of their children, are designated representatives of the class; and

3. Dechert Price & Rhoads, the Woman's Law Project, Community Legal Services, Seth Kreimer, and the American Civil Liberties Union are appointed as class counsel.

Upon consideration of Plaintiffs' Motion for a Preliminary Injunction, and defendants' response thereto, and plaintiffs' reply thereto, and the testimony of the witnesses, the admitted exhibits and the arguments of counsel, and consistent with the foregoing memorandum of law, it is hereby ORDERED that:

1. Plaintiffs' Motion for a Preliminary Injunction is GRANTED;

2. Defendants are hereby preliminarily enjoined from enforcing 62 P.S. § 432(5)(ii) and any and all regulations, rules, and policies they have promulgated to implement Act 35's multi-tier durational residency requirement until final disposition of this litigation or as this Court shall otherwise order;

3. Defendants shall, within ten (10) days of the entry of this Order, adjust the TANF cash assistance levels of all plaintiffs and class members to the levels they would now be receiving if not for implementation of the multi-tier durational residency requirement, effective with the current monthly payment period, without requiring plaintiffs or class members to take any further action;

4. Defendants shall, within ten (10) days of the entry of this Order, transmit mutually agreed-upon notice of this injunction to a list mutually agreeable to all parties of social agencies and advocacy organizations who serve new residents to the Commonwealth, including homeless shelters and shelters and agencies serving abused women and children;

5. The Department of Public Welfare shall, as quickly as possible but in any event within three (3) days of the entry of this Order, inform all County Assistance Offices of the terms of this preliminary injunction; both defendants shall, as quickly as possible but in any event within three (3) days of the entry of this Order, inform all of their agents and employees of the terms of this preliminary injunction; and

6. In accordance with the provisions of Federal Rule of Civil Procedure 65(c), plaintiffs are ordered to post nominal security in the amount of one dollar ($1.00).

AND IT IS SO ORDERED.

Supreme Court, U.S.
FILED
DEC 28 1998
OFFICE OF THE CLERK

No. 98-915

In The

Supreme Court of the United States

October Term, 1998

FEATHER O. HOUSTOUN, *et al.*,

Petitioners,

v.

EDWIN MALDONADO, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

MEMORANDUM OF RESPONDENTS IN RESPONSE TO PETITION FOR CERTIORARI

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December 23, 1998

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MEMORANDUM OF RESPONDENTS IN RESPONSE TO PETITION FOR CERTIORARI

Respondents respectfully submit this Memorandum in response to the Petition for Certiorari of Petitioners Feather O. Houstoun, *et al.*

On September 29, 1998, this Court granted certiorari in *Anderson v. Roe,* No. 98-97, to review the constitutionality of California's one-year multi-tier residency requirement for cash assistance. Both *Anderson* and the present case involve the constitutionality of durational residency requirements. Through these statutes, Pennsylvania and other states have attempted to limit the amount of welfare assistance available to newly arrived residents. The United States Court of Appeals for the Third Circuit held Pennsylvania's durational residency requirement unconstitutional, as the Ninth Circuit held California's in *Anderson.*

The Court's resolution of *Anderson* will in all probability affect its analysis of this case. Thus, as the Commonwealth suggested in its Petition, *see* Cert. Pet. 12, it would therefore be appropriate for the Court to defer action on this petition until *Anderson* has been decided.

Should the Court defer this petition pending a decision in *Anderson,* Respondents respectfully request the opportunity to file a Supplemental Memorandum that would address both the merits of the Commonwealth's

petition and the impact of *Anderson* on the resolution of the present case.

Respectfully submitted,

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